

No. 10571

United States
Circuit Court of Appeals

For the Ninth Circuit.

UNION PAVING CO., a corporation, PACIFIC
INDEMNITY COMPANY, a corporation and
MARYLAND CASUALTY COMPANY, a
corporation,

Appellants,

vs.

UNITED STATES OF AMERICA, for use and
benefit of SOULE STEEL COMPANY, a cor-
poration,

Appellee.

Transcript of Record
In Two Volumes
VOLUME II
Pages 333 to 541

Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division

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Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division

EDWARD L. SOULE,

recalled by defendant under Rule 43 of Rules of Federal Procedure; (previously sworn.)

Direct Examination

Mr. Wrigley: Q. Mr. Soule, have you with you now the records of the dates that you were on that job? A. Yes.

Q. When I say "on the job," I refer to the Pit River. May I inquire what that is that you are looking at? Is that a current memorandum that you are looking at that you have written on these dates, or was that made at the time?

A. I took these from the paid bills of the Golden Eagle Hotel, at Redding, and checked them with the P.B.X. operator's record showing the times that I was at Redding.

Q. Starting with January 6, 1940, what was the first date after that that you were up there?

A. April 7th to the 9th, 1940.

Q. Did you see Mr. Dowling there at that time?

A. Yes, I saw Mr. Dowling at that time.

Q. Did you have any conversation with him?

A. Relating to what?

Q. Anything relating to the Pit River job.

A. More than general—we went over the job. I climbed over the steel. I was particularly interested in the placing of the reinforcement steel.

Q. What is the next date that you were up there? A. On May 31st and June 1st.

Q. Did you see Mr. Dowling there at that time?

A. Yes, I did.

(Testimony of Edward L. Soule.)

Q. Did you have any conversation with him with relation to this work, or the progress of it?

A. Yes, we talked about the work. My boy, Lee, drove us up; I remember a number of different conversations that we had with Mr. Dowling.

Q. When was the next date that you were up there?

A. July 23, 1940. [188]

Q. Was that July 23rd or July 22nd?

A. My notes show July 23rd.

Q. What was that note taken from?

A. From the paid hotel bill. I have the paid hotel bills with me.

Q. Do you remember that trip up, how you went up?

A. I went up by railroad train.

Q. On what date?

A. I take it it would be on the day before.

Q. And when was your next trip?

A. September 1st and 2nd.

Q. 1940?

A. 1940.

Q. Any other trips up there during the progress of the work?

A. All of these trips were during the progress—

Q. I say any other later.

A. I don't recall that there were. I didn't check any further than these dates.

Q. Did the Union Paving Company at any time request the Soule Steel Company to install this falsework?

A. In writing, after the date that the man was killed on the job.

(Testimony of Edward L. Soule.)

Mr. Wrigley: I would ask that the last go out as not responsive.

The Court: Will you fix the date as near as you can.

A. I think that was fixed in my last testimony as October 15, 1940.

Mr. Wrigley: We will stipulate that that is correct.

Q. Prior to that date there had been no requests made to do that work?

A. No, there were no requests made to me.

Q. To you, personally?

A. Or to our company.

Q. You were not the company, were you?

A. I am the president of the company.

Q. You were just the president; they had a board of directors, didn't they?

A. That is correct.

Q. And they had other officers besides yourself, didn't they?

A. Yes, sir. [189]

Q. Mr. Thelen, of Thelen & Marrin, was a director also, wasn't he?

A. Mr. Thelen is a director.

Q. And so far as this job was concerned, Stevens was a partner, wasn't he?

A. That is correct.

Q. So you are speaking for yourself only, and not for somebody else when you say that the company received no requests; you mean so far as you were concerned?

A. There was no notice that came to the com-

(Testimony of Edward L. Soule.)

pany, and it certainly would have come to me had there been notice of such a thing.

Q. You refer to a written notice?

A. It would have come to me had it been oral or written, because I had direct charge of that particular work.

Q. You were familiar with the fact that Soule Steel Company each month was sending bills to Union Paving Company? A. That is right.

Q. You are familiar with the fact, personally, then, that they quit paying in July, aren't you?

A. I was told that they did.

Q. You were told also, weren't you, at that time, the reason that they were was they would not make any more payments until you had straightened out that falsework, the cost was to be prorated, isn't that the fact?

A. I knew there was dissension and we couldn't quite get the full reason for all of it.

Q. Starting in July?

A. The first we heard about it was October 15th.

Q. Go back to the month of July. You didn't get the pay at that time, did you, from Union Paving Company?

A. I think the records will show on that, if I had that right before me.

Q. Perhaps this memorandum will refresh your recollection (hand- [190] ing a document to the witness). Now, you had a billing for the month of March, April, May and June, and Union Paving Company made the first payment, you testified, of

(Testimony of Edward L. Soule.)

\$5000, and then you testified previously that they paid you \$12,486.25, and they did not then pay starting in July and running clear through December, is that right?

A. September 21st, 1940, \$9126.

Q. You billed them in the month of July, didn't you? A. We billed them monthly.

Q. In July you billed them for the month of June, and in August you billed them for the month of July?

A. Covering the preceding calendar month.

Q. Yes, and in August you billed for July, isn't that the fact? That is correct.

Q. And in September——

Mr. Moore: I do not think that is so. I think if you examine these, most of them are on the last of the month, if you compare these billings, Mr. Wrigley.

Mr. Wrigley: My recollection is they were dated the last day of the month, but they came out the first part of the succeeding month. That is the fact, isn't it?

The Witness: I presume that the record would come—we would have to receive the amount of tonnage placed in the preceding calendar month, and we would get that from the United States Government office, and then we would bill.

Mr. Wrigley: Q. And when you did not get the pay for the month of July, did you take it up with anybody why?

A. That would be handled by our accounting

(Testimony of Edward L. Soule.)

department, and often times contractors do not pay for a month or two, because they might be pressed for money in connection with the handling [191] of the job.

Mr. Wrigley: I ask that be stricken out as not responsive to any question.

The Court: Read the question, Mr. Reporter.

(Question and answer read by the reporter.)

The Court: Let the question and answer stand.

Mr. Wrigley: Q. Did you personally take it up with Mr. Dowling, or any representative of Union Paving Company to find out why they were not paying? A. No, personally, I did not do that.

Q. For any of those months, July, August, or September; there weren't any payments in those months, according to your statement, and I think the fact is there weren't any.

A. September there was a payment.

Q. According to the records, and according to your testimony, the first payments were \$5000, \$12,486.25, and then we jumped over to August, paid \$9126.04.

Mr. Moore: No, the first payment of \$5000 was made in July.

Mr. Wrigley: Yes.

Mr. Moore: The next payment, \$12,000 was made in August, and the payment of \$9000 was made September 21st.

Mr. Wrigley: Paid what bills?

Mr. Moore: I haven't got the breakdown, but it

(Testimony of Edward L. Soule.)

came very close to—I have got it here—it practically paid the account up to date.

Mr. Wrigley: Not according to your billing; according to your billing it paid up to the earlier date.

Q. You say the first time the matter was brought to your attention in writing was in October, September of October of that year, 1940?

A. October, on or around October 15th is the time [192] that we heard of the controversy in connection with our not supplying the falsework.

Q. And isn't it a fact that *at time* your representatives on the job started to supply not only materials but also the labor to install the falsework?

A. That is not the fact.

Q. Didn't you, on October 25, 1940, employ carpenters and others who erected falsework there, interior falsework?

A. Certainly not to my knowledge.

Q. Now, on Friday, October 25, 1940, on Pier No. 5, weren't two of your men engaged in erecting the scaffolding on one of the shifts?

A. Mr. Stevens would have to testify to that. I wasn't on the job and have knowledge of that. It would only be the record or information coming to me later that would give evidence to me of such a thing.

Q. Didn't that fact come to your attention the next day—your attention, personally, now?

A. I would have to find where I was—on or about that time I was in Washington, D.C. for quite

(Testimony of Edward L. Soule.)

an extended time—I would have to check up to find out what time I was in Washington, D.C.

Q. Mr. Stevens reported back that he had conferred with you and that you told them not to do that work; that might or might not have been correct?

A. I would have to check up the times as to where I was.

Q. Before you signed the contract of January 6, 1940 had you examined the contract in any way, or the specifications between the Union Paving Company and the United States Government?

A. Yes, I had a copy of the specifications.

Q. Now, coming back to these dates that you say you were on the job, in April, from the 7th to the 9th, May 31st or June 1st—let us take the 1st: Was Mr. Stevens there? A. Yes. [193]

Q. On the first date?

A. April 7th to 9th, yes.

Q. Now, on the second trip, which you fix as May 31st and June 1st, was Mr. Stevens there?

A. I believe that he was. That can be determined from the record.

Q. Have you any recollection of it?

A. Mr. Stevens kept a daily log on the job.

Mr. Wrigley: I would ask that that go out. I asked him if he kept any record showing whether Mr. Stevens was there or was not there on May 31st.

The Witness: His note states that "Dowling,

(Testimony of Edward L. Soule.)

Soule and I went over the job together," and I take it from that.

Mr. Wrigley: Q. That is May 31st?

A. May 31st and June 1st, and that is my recollection, that we did go over the job together.

Q. Now, we take the third date, July 23rd, 1940. Was Mr. Stevens there?

A. I would have to refer to his log to find out.

Q. Have you any recollection of it?

A. Nothing particularly at the moment comes to mind. I am rather believing that he was there. I am not certain now of that at that time.

Q. Who was the representative of the Union Paving Company, if any, that you saw there on July 23rd?

A. That was Mr. Morrisett, I think. The gentleman is in court.

Q. Now we come to the dates that you fix as September 1st and 2nd, 1940; was Mr. Stevens there?

A. Yes, he was on the job.

Q. Who was the representative or representatives of Union Paving Company that you saw there?

A. Mr. Morrisett.

Q. Showing you, Mr. Soule, what purports to be a carbon copy of a letter dated February 5, 1940, from Soule Steel Company to J. K. Welding Company, Inc., signed apparently by yourself, can you tell us whether that is a true copy of the letter that [194] you sent to the J. K. Welding Company (handing a document to the witness)?

(Testimony of Edward L. Soule.)

A. This is a carbon copy of the letter that I sent to the J. K. Welding Company.

Mr. Wrigley: Without reading the whole letter in evidence, and reading only what I think is the significant part of this letter, "When we come to the place of splicing, we then hoist the second bar, hold the top end in position against a suitable frame, which to my knowledge has not been determined from the field."

∴ We offer that as defendants' exhibit next in order.

(The document referred to was thereupon received in evidence and marked "Defendants' Exhibit DD.")

Mr. Wrigley: Q. Showing you, Mr. Soule, what purports to be a carbon copy of a letter from the Soule Steel Company to the J. K. Welding Company, under date of March 5, 1940, and purporting to be signed by you——

A. That is correct.

Mr. Wrigley: Reading only what we consider the significant part of this letter, "If you reply favorably we would like to have you give us the letter in duplicate, one copy of which we would want to pass on to the Union Paving Company, because they are the contractors on the job and nothing can be taken up by you or by us directly with the Government."

We offer this as defendants' exhibit next in order.

(The document referred to was received in evidence and marked "Defendants' Exhibit EE.")

(Testimony of Edward L. Soule.)

Mr. Wrigley: Q. Now, Mr. Soule, one of the matters that you worked out was the matter of the lease or rent of the property at Redding where the steel was unloaded, was it not?

A. That is right.

Q. And that was not worked out in final shape until July of that [195] year, was it?

A. There was an understanding had, but we had several letters and conversations, and the final turning over of the lease from Mrs. Kay Kite to ourselves was not done by the Union Paving Company until several requests had been made by us. I think the first few payments were made to Mrs. Kite by the Union Paving Company.

Q. And you agreed for those first few months to reimburse the Union Paving Company for the agreed rent?

A. That is right.

Q. These letters, one purporting to be a copy of a letter to you and the other to Mrs. Kite, do they refresh your recollection as to when that was done?

A. These are dated July 16th.

Q. And they are correctly dated, are they?

A. I presume they are.

Mr. Wrigley: Without reading these letters in detail, just fixing the date as July 16, 1940, one is a letter of instruction from the Union Paving Company to Mrs. Kite to make the lease with Soule Steel Company, and also a letter from the Union Paving Company to Soule Steel Company enclosing a copy

(Testimony of Edward L. Soule.)

of that letter for them to make the payments to Mrs. Kite under the lease made with her.

(The document was received in evidence and marked "Defendants' Exhibit FF.")

Mr. Wrigley: Q. I am showing you, Mr. Soule a copy of a letter on the letterhead of the Union Paving Company, dated October 28, 1940, signed apparently Union Paving Company by L. W. Hunt, addressed to Soule Steel Company, Redding, and contains a notation that it was received by L. E. Stevens. Is that Mr. Stevens' handwriting?

A. This is his signature (indicating).

Mr. Wrigley: We offer this in evidence next in order, dated October 28, 1940, addressed to the Soule Steel Company, [196] reading as follows.

(The document was thereupon read by Mr. Wrigley, received in evidence, and marked "Defendants' Exhibit GG.")

Mr. Wrigley: Q. I am showing you next, Mr. Soule, what purports to be a letter on the letterhead of the Soule Steel Company, signed Soule Steel Company by L. E. Stevens, addressed to Union Paving Company. reading. "Attention Mr. L. W. Hunt," and ask you if that is Mr. Stevens' signature to that letter.

A. That is correct.

(The document was read by Mr. Wrigley, received in evidence and marked "Defendants' Exhibit HH.")

Mr. Wrigley: Q. Showing you, Mr. Soule, what

(Testimony of Edward L. Soule.)

purports to be a letter on the letterhead of the Soule Steel Company dated January 18, 1941, and purporting to be signed at the bottom of the second page by you as president, was that letter sent by you? Is that signature by you? A. That is correct.

Mr. Wrigley: Without reading this letter in evidence, but offering it for the reason that it lays the basis for certain letters which refer to this letter, Mr. Soule summarizes the billing up to that time and the payments to date, quoting certain provisions of the contract, and demands the balance then due of \$30,979.52. I offer that as defendants' next in order.

(The document was received in evidence and marked "Defendants' Exhibit II.")

(Testimony of Edward L. Soule.)

DEFENDANTS' EXHIBIT II

Los Angeles	[Emblem]	Telephone
Portland		Valencia 4141
Houston		

Soule Steel Company
 Iron and Steel Products
 1750 Army Street, San Francisco
 January 18, 1941

Registered Mail

[Longhand notation]: Return receipt

Union Paving Company
 310 California Street
 San Francisco, California

Re: Agreement of January 6, 1940, be-
 tween Union Paving Co. and Soule
 Steel Company — Subcontract on
 Pit River job.

Gentlemen:

In accordance with statements heretofore trans-
 mitted by us to you, you owed us, in addition to re-
 tained percentages, the following amounts under the
 above agreement:

1940	
Sept. 24—Balance due—	\$ 368.50
Sept. 30—Additional amount for month of September—	10,614.38
Oct. 31—Additional amount for month of October	17,454.34
Nov. 30—Additional amount for month of November—	14,076.00
Dec. 31—Additional amount for month of December—	8,466.30
TOTAL	\$50,979.52

(Testimony of Edward L. Soule.)

On said total, nothing has been paid by you with the exception of \$20,000.00 paid on the 17th instant, leaving an amount due, to and including December 31, 1940, in the sum of \$30,979.52.

Said contract provides, in part, as follows:

“The contractor agrees to pay said subcontractor for placing reinforcement bars at the rate of \$22.50 per ton for reinforcement bars actually placed in accordance with the plans and specifications which shall be considered as full compensation for unloading, warehousing, hauling, bending and placing reinforcement bars and clamps, and doing all work necessary or incidental thereto and for furnishing all tie wire, clamps and supporting devices.”

Said agreement further provides, in its last paragraph, as follows:

“Payments are to be made to subcontractor on or about the 10th of the following month for 85% of the value of the work performed during the preceding month, and the remaining 15% to be paid thirty days after completion of said subcontractor's portion of the work.”

As you know, we have made frequent requests that the balances due to us under said agreement be paid by you. Your failure and refusal to do so constitutes failure on your part to live up to the terms of your agreement.

Demand is now made upon you that you forth-

(Testimony of Edward L. Soule.)

with pay to us said sum of \$30,979.52 due, as aforesaid, under said agreement.

And you are further notified that, unless said payment is promptly made, we shall avail ourselves of all necessary remedies to recover said moneys from you.

Yours truly,

SOULE STEEL COMPANY

By EDW. L. SOULE

Edw. L. Soule

President

ELS/en

[Endorsed]: Filed 4/15/43.

Mr. Wrigley: Q. Mr. Soule, showing you what purports to be a carbon copy of a letter from Union Paving Company to Soule Steel Company under date of January 22, 1941, I ask you if the original of that letter was received by you or your company (handing document to the witness).

A. I remember of receiving the letter. [197]

Mr. Wrigley We offer this document. First I will read it.

(The document was read by Mr. Wrigley, received in evidence, and marked "Defendants' Exhibit JJ.")

The Court: We will take an adjournment now until two o'clock.

(A recess was here taken until 2:00 o'clock p.m.) [198]

Afternoon Session, April 15, 1943 —

2:00 O'Clock P. M.

The Court: Proceed.

EDWARD L. SOULE,

recalled.

Direct Examination (resumed)

Mr. Wrigley: Q. Mr. Soule, showing you a letter on the letterhead of the Soule Steel Company dated January 25, 1941, addressed to Union Paving Company, 310 California street, is that your signature at the bottom? A. Yes, sir.

Q. And that letter was sent on or about that date? A. That is right.

Mr. Wrigley: We offer this letter in evidence and ask that it be marked defendants' Exhibit next in order.

(The document was received in evidence and marked "Defendants' Exhibit KK.")

Mr. Wrigley: I do not think it is necessary to read this letter in detail at this time; it lays the foundation for the succeeding letters. It is a letter in which the Union Paving Company was asked to furnish an exact statement of their claim, itemizing their statement.

Q. I am showing you, Mr. Soule a letter on the letterhead of the Soule Steel Company, dated February 3, 1941, addressed to Union Paving Company, from Soule Steel Company, apparently signed by Mr. Stoddard. Is that Mr. Stoddard's signature?

A. That is Mr. Stoddard's signature.

Q. That letter was sent on or about its date?

(Testimony of Edward L. Soule.)

A. Yes, sir.

Mr. Wrigley: This letter is very short, so I will read the body of it.

(The document was read by Mr. Wrigley, and received in [199] evidence, and marked "Defendants' Exhibit LL.")

Mr. Wrigley: Q. I am showing you, Mr. Soule, a copy of a letter dated February 15, 1941, on the letterhead of the Union Paving Company, addressed to Soule Steel Company, from Union Paving Company, by J. W. Desmond, and ask you if the original of that letter was received (handing a document to the witness).

A. I believe I remember receiving that letter.

Mr. Wrigley: This letter reads as follows.

(The document was thereupon read by Mr. Wrigley, received in evidence, and maked "Defendants' Exhibit MM.")

Mr. Wrigley: Q. Mr. Soule, showing you a carbon copy of a letter dated March 1, 1941, addressed to Soule Steel Company, from Union Paving Company, I ask you if the original of that letter was not received.

A. I believe that is correct. A careful perusal of our file would verify it.

(The document in question was thereupon read by Mr. Wrigley, received in evidence, and marked "Defendants' Exhibit NN.")

Mr. Wrigley: Q. I am showing you, Mr. Soule, a letter on the letterhead of the Soule Steel Com-

(Testimony of Edward L. Soule.)

pany, dated February 25, 1941, addressed to Union Paving Company, 310 California street, apparently signed Soule Steel Company, by D. J. Stoddard, and ask you if that is Mr. Stoddard's signature.

A. That is his signautre.

Q. That letter was sent on or about the date it bears? A. Yes.

(The document was thereupon read by Mr. Wrigley, received in evidence, and marked "Defendants' Exhibit OO.")

DEFENDANTS' EXHIBIT OO

Los Angeles	[Emblem]	Telephone
Portland		Valencia 4141
Houston		

Soule Steel Company
Iron and Steel Products
1750 Army Street, San Francisco
February 25, 1941

Registered Mail
Return Receipt Requested

Union Paving Company
310 California Street
San Francisco, Calif.

Gentlemen :

Re: Agreement of January 6, 1940, between Union Paving Company and Soule Steel Company—Subcontract on Pit River Job

We desire to acknowledge receipt of your letter of the 24th instant in the above entitled matter.

(Testimony of Edward L. Soule.)

Referring to the first four items of alleged charges as set forth in your letter, this is the first time that you have quoted any detailed figures so that we could see what you have in mind with reference to the matter. Heretofore you have given us nothing except some vague suggestions that you would have some additional counterclaims. As to other counterclaims, you have in the past presented the same approximately monthly as the job progressed, but as to said four items you have waited until our work has been approximately 85 per cent completed.

Now that we have some tangible indication of what you have in mind, we advise you at once that under the above agreement there is no responsibility on Soule Steel Company in connection with any of said four items. Under said contract there is no obligation on Soule Steel Company to furnish any of said items and there has been no letter or conversation which has imposed any such obligation on Soule Steel Company.

Under said contract you have no right to deduct any of said charges from the amounts of money due, or to become due, to Soule Steel Company thereunder, and we again make demand upon you for the payment of said charges, the amount of which have been improperly withheld by you from us. Under the circumstances there is no good reason why we should follow the suggestion contained in the third paragraph of your letter.

Referring now to the fifth item of charges in your letter, we request that you forward to us a detailed

(Testimony of Edward L. Soule.)

statement of your invoices and charges aggregating the total sum of \$495.81. Promptly upon receipt of such statement we shall be glad to review the same and to advise you of our conclusions.

Yours truly,

SOULE STEEL COMPANY

By D. J. STODDARD

D. J. Stoddard

DJS: DL

Quotations subject to change without notice. All sales, contracts or agreements subject to strikes, accidents or causes beyond the company's control.

[Endorsed]: Filed 4/15/43.

Mr. Wrigley: Q. Showing you next, Mr. Soule, a letter on the letterhead of the Soule Steel Company, dated March 7, 1941, addressed to Union Paving Company, apparently signed by D. J. Stoddard, I ask you if that is Mr. Stoddard's signature. [200]

A. That is correct.

Q. And that letter was sent on or about its date?

A. That is right.

(The document was thereupon read by Mr. Wrigley, received in evidence, and maked "Defendants' Exhibit PP.")

Mr. Wrigley: Q. Showing you, Mr. Soule, what purports to be a letter from Union Paving Company to Soule Steel Company, under date of April 11, 1941, and bearing the note, "The original of this

(Testimony of Edward L. Soule.)

parties, and we got no place. I will stipulate to that if that is what you are attempting to prove.

Mr. Wrigley We want to show that at all times two things were uppermost: We had to keep this work going; we had an absolute time limit with a penalty, and we were trying to reach an agreement with them without going to court. All these figures and these letters show that they were trying to reach [202] an agreement. They were considering the matter, discussing it, holding conferences, and never did reach anything definite, but were always discussing it and trying to reach a settlement in the matter.

Mr. Moore: The general rule is, I think, your Honor, anything that is said or done in a matter of attempted compromise is not admissible.

Mr. Wrigley: It is not attempted compromise, at all; it is an attempted agreement on the facts—not an attempt to compromise. That is something that came up later.

Mr. Moore: I won't persist in my objection. I thought I could shorten it perhaps by some stipulation.

Mr. Wrigley: I think we are practically through here.

Q. Showing you what purports to be a copy of my letter to Mr. Thelen, of Thelen and Marrin, I ask you didn't that letter, after it was mailed to Mr. Thelen, reach you, or wasn't it shown to you?

A. Undoubtedly this went to Thelen & Marrin and formed a part of the entire case. Mr. Stoddard

(Testimony of Edward L. Soule.)

was attending to most of this at that time with Mr. Thelen's office.

(The document was thereupon read by Mr. Wrigley.)

Mr. Wrigley: Q. Now, isn't it a fact, Mr. Soule, that just ahead of the date April 22, 1942, a conference was had in the office of Mr. Thelen, 111 Sutter street, at which you were present, Mr. Thelen was present, Mr. Dowling was present, and I was present, and we attempted to go over the figures and determine what proportion, if any, was properly chargeable to Soule Steel Company and what proportion should be charged to Union Paving Company?

A. I would have to answer your question in two parts. A conference was held. As to the exact date that the conference was held in Mr. Thelen's office, I would [203] have to have some means of fixing—but a discussion, part 2—

Q. Pardon me for interrupting; we are talking about the first conference that was held, and not the later, the last conference.

A. We had two conferences in Mr. Thelen's office. That date, as I suggest, I cannot fix without going through some correspondence that I had about that time; now, in part 2, you said as to the proportion charged to each one. I don't think it was on the case of—it was not my understanding that it was on the case of what proportion we were to pay, it was a compromise not to take it to court.

(Testimony of Edward L. Soule.)

Q. No, I am talking about the first conference, now.

A. I never understood that any conference I had was on a liability claim by us in any respect. It would be money incurred in taking it to court and detracting from—and I remember Mr. Thelen saying many times that both you and Mr. Dowling ought to be fully engaged in the war effort—and goodness knows, we were so deep in building invasion barges and other smaller vessels for the Navy that we didn't want to take any time out in order to go through any period of legal procedure.

Q. Wasn't that all at the second conference when we tried to reach a compromise, and wasn't it the conference also in which you and Mr. Dowling were excused from the room and Mr. Thelen and myself did something—you don't know what, but when you and Mr. Dowling came back we then attempted a compromise figure, which was rejected?

A. The thought of Mr. Thelen and myself was always contained in the idea that we did not want to take this to court. It is our practice not to take cases to court if there is any possible way to adjust them, and to continue that thought, Mr. Thelen, being at our board of directors meeting, knew we had all the load we could possibly carry without going [204] into any lawsuits.

Q. Didn't most of that that you have in mind now take place at the second conference?

A. No, I have already said that that continuity of thought has existed all the way through, and my

(Testimony of Edward L. Soule.)

memory serves me correctly that was given at both conferences, and more emphatically and particularly emphasized at the last meeting.

Q. And the last meeting, when Mr. Thelen was present, you were present, Mr. Dowling was present, and I was present in Mr. Thelan's office, was held at a way later date, wasn't it?

Mr. Moore: Was what?

Mr. Wrigley: Q. Held at a way later date?

A. That was held at a later date, you are correct.

Mr. Wrigley: We offer this letter in evidence.

(The document was thereupon received in evidence and marked "Defendants' Exhibit UU.")

Mr. Wrigley: Q. Mr. Soule, showing you a letter on the letterhead of the Soule Steel Company, dated September 4, 1942, addressed to Union Paving Company by Soule Steel Company, apparently signed by yourself, is that your signature?

A. That is correct.

(The document was thereupon read by Mr. Wrigley, received in evidence, and marked "Defendants' Exhibit VV.")

Mr. Wrigley: Mr. Moore, have you got a copy of my letter of September 10, 1941, to Mr. Marrin?

Mr. Moore: Yes.

Mr. Wrigley: Q. Mr. Soule, showing you a carbon copy of a letter apparently written by me to Messrs. Thelen & Marrin, attorneys at Law, I

(Testimony of Edward L. Soule.)

ask you if Mr. Thelen showed you that letter and the exhibits that accompanied it?

A. Yes, sir, he did. [205]

Q. Can you tell us whether these are the exhibits? A. \$61,112.32.

Mr. Wrigley: We offer this next in order, but I jumped over a year there. This is in 1941, September 10, 1941, a letter by me addressed to Messrs. Thelen & Marrin, Attorneys-at-Law, Balfour Building, San Francisco, California; presumably they changed their office about that time.

(The document was thereupon read in evidence.)

Mr. Wrigley: With that was a copy of a letter from the Union Paving Company, addressed to me, dated September 10th, showing the total charges, first the charge against Union Paving Company, the charge against Soule, and the miscellaneous, and accompanying that is a detailed statement or breakdown in part by price of abutments 1 and 2, piers 1 and so on. We offer that as defendants' next in order.

(The document was thereupon received in evidence and marked "Defendants' Exhibit WW.")

(Testimony of Edward L. Soule.)

DEFENDANTS' EXHIBIT WW

September 10, 1941.

Messrs. Thelen & Marrin,
Attorneys at Law,
Balfour Building,
San Francisco, Calif.

Gentlemen:

Attention: Mr. Thelen.

Re: Soule Steel vs. Union Paving Co.

I enclose herewith two carbon copies of statement showing the charges by Union Paving Company against Soule Steel Company.

Attached to the letter, you will find a breakdown of the figures which, I think, is self-explanatory, as far as it goes.

If further data is desired, I shall be glad to furnish same.

Very truly yours,

HFW :jp

Encl.

September 10, 1941

Mr. H. F. Wrigley
Monadnock Building
San Francisco, California

Dear Sir:

The total cost of constructing supports for reinforcing steel, templets, spacers, falsework, runways,

(Testimony of Edward L. Soule.)

etc., for use in building the Piers and Abutments of the Pit River Bridge is as follows:

Chargeable to Union Paving Co.:

Runways	\$38,063.93		
Falsework	13,575.87	\$51,639.80	
10% Supervision	<u> </u>	5,163.98	\$56,803.78

Chargeable to Soule Steel Co.:

Temporary supports for reinforcing steel, in- cluding templets and spacers	53,486.56		
10% Supervision	5,348.66	58,835.22	

Miscellaneous charges to Soule Steel Co.:

Moving and repairs to boom	1,893.82		
Additional Miscell. charges	383.58	2,277.40	\$61,112.62

This of course does not take into consideration any assessments for liquidated damages.

Yours very truly,

UNION PAVING CO.

By AL

AL: E

(Testimony of Edward L. Soule.)

Chargeable to Soule Steel Co.:		
Temporary Supports:		
Abutment 1	Labor	
	\$ 2,905.64	
Pier 1	784.71	
2	5,358.26	
3	13,263.77	
4	8,417.89	
5	2,478.63	
6	2,457.19	
7	2,185.00	
Totals	\$37,851.09	
10% Supervision		\$53,486.56
		5,348.66
Miscellaneous Charges		
Moving & Repairs to Boom		\$ 1,893.82
Additional Miscell. Charges		383.58
		2,277.40
		Total \$61,112.62

[Endorsed]: Filed 4/15/43.

(Testimony of Edward L. Soule.)

Mr. Wrigley: Q. Showing you, Mr. Soule, what appears to be a carbon copy of a letter of September 9, 1942, addressed by Soule Steel Company to Mr. Max Thelen, of Thelen & Marrin, enclosing a statement which for indention has been marked "Plaintiff's Exhibit B, Frank L. Hart, Reporter," annexed to the deposition, and ask you if the original of that letter was sent with a copy of that statement? A. That is correct.

Q. I will now ask you, Mr. Soule, if it is not correct, as appears from that letter, that a statement, or this statement, or maybe several copies of it, was not received from Union Paving Company without any letter of transmittal, or anything else, but just received in the mail, as your letter indicates?

A. I don't believe I would know that, unless there was a letter [206] of transmittal attached to it.

Q. Well, in your letter you state, "Both of these statements were received from them without comment, simply saying "From: 'Union Paving Company, 310 California street, San Francisco, California' "?

A. Don't those two statements refer one to a summarization by price and one as to materials? Here is only one statement attached to this one. This one gives the price, labor, insurance, equipment, lumber, steel, and so forth.

Mr. Wrigley: Mr. Moore, have you any such

(Testimony of Edward L. Soule.)

statement as the statement to which he refers in his testimony?

Mr. Moore: No; I understand apparently they were duplicate statements.

Mr. Wrigley: The letter so states, original and a duplicate, but he thinks there was another statement.

Mr. Moore: That is the way it was turned over to me.

Mr. Wrigley: The letter from Mr. Soule indicates that there was an original and a carbon of the same identical statement. We merely offer these in evidence.

Q. First, that would be correct as to the date, on or about September 9, 1942?

A. The postmark would certainly show on that letter as to the time of receipt. This is dated September 8th. There is the postmark.

Q. Did you receive it from Union Paving Company?

A. Yes. On the back is the receipt—our stamp shows Received September 9, 1942 at 12:00 o'clock.

Q. From Union Paving Company?

A. That is correct. The letter was opened at that time.

Mr. Wrigley: We offer this as our exhibit next in order.

(The document was thereupon received in evidence and marked "Defendants' Exhibit XX.")

(Testimony of Edward L. Soule.)

Mr. Wrigley: Q. Isn't it a fact, Mr. Soule, that the conference at Mr. Thelen's office, where an attempt was made to compromise this, which failed, was following this date of September 9, 1942?

A. I have no exact way of fixing that date unless I would look up some records.

Q. Have you any record of the date of that conference?

A. The best record I would have would be to consult Mr. Thelen, because he keeps a very accurate log of happenings.

Q. You haven't any recollection on the subject, at all?

A. As to the exact date.

The Court: Do you know the date?

Mr. Wrigley: Not exactly in my mind. I think it was September 12th.

Mr. Moore: There is no particular dispute that I know about concerning the date.

Mr. Wrigley: Not the date, but I just wanted to establish that it was after that statement that we tried to compromise and settle.

The Witness: Mr. Thelen was handling the case entirely at that time, and if he asked me to come to his office, I did.

Q. But it was after this statement was furnished?

A. I wouldn't know that.

The Court: He received this statement September 9th.

Mr. Moore: I think, Mr. Wrigley, as a result of this meeting it was arranged that Mr. Stoddard, of the Soule Steel Company go down and go over

(Testimony of Edward L. Soule.)

Cross-Examination

Mr. Moore: Q. Mr. Soule, calling your attention to Exhibit WW, I will ask you, isn't it a fact that on September 10, 1941, the date of that, that you for the first time got a statement from the Union Paving Company as to what their claim was?

A. That is correct, and we transferred the statement to Mr. Thelen.

Q. They had quit paying you in October of the previous year, is that correct?

A. That is right.

Q. Or September—

A. That is the testimony that was given this morning.

Q. There was a payment at the end of the year?

A. There was a later payment of \$16,000 over and above those that were given in evidence this morning.

Q. You were examined, Mr. Soule, with regard to the stated account at the time this dispute started, and on this blueprint, [210] or whiteprint you placed there a statement of the account of Soule with the Paving Company up to September 30, 1940, is that correct?

A. This is a true statement taken right from the bills submitted and is of our own account.

Q. This shows a payment by the Union Paving Company by cash on September 21st of \$9126.04, is that correct? A. Yes, sir.

Q. And the balance at that time was some \$9537?

A. That is right.

(Testimony of Edward L. Soule.)

Q. In other words, this payment——

A. Practically balanced.

Q. Practically balanced your account?

A. Correct.

Q. So far as you know, at that time there had never been any claim made that there was any obligation on the part of the Soule Steel Company to install this interior framework? A. No, sir.

Q. Mr. Soule, when did you first meet Mr. Dowling in regard to subcontracting this job?

Mr. Wrigley: Same objection to this line of questions that was made previously.

The Court: What was the question?

(Question read.)

The Court: Answer.

A. I am not sure that I exactly understand that question. Let me go back to the beginning, which takes me back to the history coming up to the job. I suppose the answer would be properly given when I say about October 4, 1939.

Mr. Moore: Q. How do you fix that date?

A. That is the day before the bid letting.

Q. Did you have a conference with him at that time? A. I did.

Q. Where was that conference?

A. That conference was held in the Senator Hotel, at Sacramento, California.

Q. Now, who was there? [211]

Mr. Wrigley: Pardon me. For the record, it will be stipulated that this is all going in subject to my

(Testimony of Edward L. Soule.)

objection on the ground it is incompetent, irrelevant, and immaterial, and an attempt to vary the terms of a written contract?

Mr. Moore: So stipulated.

The Witness: Ross Mahon had taken a plane about noon from our office in order to gather information as to what all the contractors were bidding, and in order that we might prepare the bid to fit their construction needs.

Mr. Wrigley: I ask that that all go out as not being responsive.

Mr. Moore: That may go out.

Q. Will you just tell us what occurred in the presence of Mr. Dowling, Mr. Soule?

A. Mr. Mahon and I called upon Mr. Dowling to ascertain from him how he wanted our proposal, and he stated to us he wanted it with the supporting means, and we were to do all the things in the plans and specifications.

Q. And did you give him the figures at that time?

A. Not at the first conference. At the second conference, in the evening, after Mr. Dowling had gone to his bed, we went up to see him about eleven o'clock that night, October 4th, and gave him a bid of thirty——

Q. You do not have to go into that. What was his answer to it?

A. He said, "I believe it is high."

Q. Did that estimate include the supporting devices?

A. It did.

(Testimony of Edward L. Soule.)

Q. Did you have a subsequent conference with Mr. Dowling in connection with the bidding on this work?

A. When we came back to San Francisco Ross Mahon and I went in to see him two days after the letting, which was on October 7th, and we subsequently followed that up with a letter, which we have in our files, [212] telling him that we would like to carefully look into the way in which he would like to have his bid made and we would endeavor to get our bid down in the running so that it would be satisfactory to him.

Q. What did you do in connection with that?

A. We immediately began to make estimates.

Mr. Wrigley: I object to that as incompetent, irrelevant, and immaterial, what they did out of the presence of the defendants.

A. We sent a set of plans and specifications to our Los Angeles office and asked them to give us a check estimate on what they believed to be the cost of installing this material, and the Los Angeles office made up the large print which you showed this morning, which is Pier No. 3, drawn to a particular scale, showing the reinforcing bars, as to where they are located in the pier, showing where the bars lap and weld.

Q. I will hand you a drawing and ask you if that is the drawing which your Los Angeles office prepared.

A. This is the drawing, except—

Mr. Wrigley: Pardon me. In addition to our previous objection that this is all incompetent, ir-

(Testimony of Edward L. Soule.)

relevant, and immaterial, and an attempt to vary the terms of a written instrument, there is no evidence showing that this was ever brought to the attention, in any way, of the Union Paving Company.

Mr. Moore: I will prove that as soon as I can get to it.

The Court: Proceed. The objection is overruled.

A. The drawing did not have the inside part, here, but it did have the outline of the piers, plus all of the reinforcing bars in it. All of these original marks and the outside pier, and everything, was sent up to us, brought up to us by Mr. Hogan, from [213] the Los Angeles office.

Q. Did you have any talk with Mr. Earl Stevens at that time? A. On November——

Mr. Moore: I will ask that this be marked for identification, your Honor.

(The document marked “Plaintiff’s Exhibit 22 For Identification.”)

A. On November 22nd I telephoned to Mr. Stevens and asked him to come to San Francisco, that I desired to have him figure this work.

Mr. Wrigley: I object to this. There is no connection with our client, whatever *there* office did.

Mr. Moore: I am willing that that latter part go out.

Q. You and Mr. Stevens did re-estimate the job, did you, in connection with your Los Angeles office? A. We did, yes, sir.

Q. Did you have any conference or any talk

(Testimony of Edward L. Soule.)

with either Mr. Dowling of any of his employees about the type of structure that was desired?

A. As supporting means?

Q. Yes. A. I did.

Q. With whom did you have the conversation?

A. More particularly in the early stages with Mr. Cochrane, his outside superintendent, on or about the middle of November.

Q. Did you do anything further? What did he tell you at that time?

A. Mr. Cochrane asked us how we expected to support those reinforcement bars—and a yellow pencil sketch is shown on that drawing—and when I explained to him that we expected to do that either by one of two ways, but we found the cheapest way would be to put up what we called a structural triangle that took the slant of the bars, plus a supporting member here, and then that was trussed up, against which we laid the bars——

[214]

Q. That was the method you described?

A. That was the method we described and it is outlined on that.

Q. What did Mr. Cochrane say when you explained that, if anything?

A. Mr. Cochrane said that that was not a very good way to coordinate the two contracts. If we would put in these triangular structural pieces, that would be so much expenditure of money, that they intended to put up falsework, putting up falsework to support their runways, and on it

(Testimony of Edward L. Soule.)

the workmen would run their buggies, and from which they would pour the concrete, and there would be a duplication in that way. And a discussion was had on or about that time as to getting the job entirely coordinated, because they were trying to get the very best price they could from us.

Q. Did you redraft your plans or estimates?

A. Yes, we did.

Q. Then at about the time these plans were redrafted or your estimates redrafted, did you dictate a proposed bid?

A. Well, there was a little history in there between that time. Mr. Dowling wanted us to take the welding of the steel. On November 17th or 18th we procured two-inch bars from the Columbia Steel Company, as our record shows, and Mr. Dowling and Mr. Cochrane came down to our office; we cut those two-inch bars in accordance with the specifications. They went out into our office on these two different days. We set them up in the position like they would be in the field, and we performed the welding with our welders to ascertain whether or not we wanted to bid on the welding, too.

The second day the Lincoln agent, Mr. Cunningham, brought in his expert welder and we had set up in a row several of these bars at just the distances they would be in the job, in order to see how we were going to get in to weld those, because they [215] were setting very close in there, and

(Testimony of Edward L. Soule.)

we didn't know just how much of a job that was going to be to get in, or whether we could do it, at all, because there were three sets——

Q. Without going into it, you decided not to bid on the welding, is that correct?

A. We decided we could not do it for anywhere near the price, particularly on account of the waiting time on the welders that would have to be on the job.

Q. Did you subsequently, on or about December 11th, dictate a memorandum offer or agreement? I will hand you a carbon copy of it.

A. To complete the history just a little bit on this, we had revised our price down, knowing that Murphy's price was \$30, and we had been told by Mr. Dowling and by Mr. Cochrane, both, that Mr. Murphy's price was \$30, and we had to bid that price, which price included the supporting means or falsework, or however you want to designate that. We therefore asked Mr. Stevens to come down again on December 9th—he flew down here—and we went over our estimate again and pared our estimate down to \$28.60 per ton. We took out the amount which we had calculated in for the supporting means, which was \$3.77 a ton, which made \$24.83, and dropped off the 3 cents, and I, on December 11th, dictated this letter that you have given me.

Q. Now, there has been one introduced in evidence already with a pencil memorandum on it;

(Testimony of Edward L. Soule.)

did you at any time deliver a copy of this letter to Mr. Dowling? A. Yes, sir.

Q. When, if you remember?

A. On November 20th we felt—before November 20th a little bit we felt our price then—we had reduced it down to \$24.80——

Q. Did you mean November or December?

A. Did I say November? Excuse me. December,—was in the running, and then we had to [216] coordinate as to the——

Mr. Wrigley: I object to that. The question has been asked and answered. This is not responsive to any question—in addition to the previous objections.

Mr. Moore: Q. Did you give Mr. Dowling a copy of this letter?

A. Later on we did, yes.

Q. When was it? Where was it that you gave it to him, do you remember?

A. Gave it to Mr. Dowling in my office at 1750 Army street.

Q. When?

A. Mr. Dowling came into our—Mr. Dowling and Mr. Cochrane came into our office on December 29, 1939.

Q. I may be wrong; the question may be slightly leading. You took a trip up to the jobsite with Mr. Dowling, didn't you? A. Yes, we did.

Q. When was that?

A. That was December—went up on December 20th and went over the job on December 21st.

(Testimony of Edward L. Soule.)

Q. Directing your attention to this letter, on that trip did you give him a copy of this letter?

A. I think I gave him a copy of that letter, and then I put the pencil notations on the conference of December 29th.

Q. Along about December 20th or 21st you went up and went over the jobsite with Mr. Dowling?

A. Yes, sir.

Q. And I assume you discussed the contract and the work?

A. Both going up on the train, and we were in his room in the Golden Eagle Hotel the night of December 21st, and we discussed it there.

Q. Then did you come back together?

A. Yes, we did.

Q. Then did you have a further conference?

A. We did, on December 29th.

Q. How do you fix that date, Mr. Soule?

A. Well, it was very, [217] very close to the end of the year, and in reviewing that in my mind I remember of having told Mr. Stevens that we would like to clear up this job before the end of the year, and particularly on our estimate that we revised down.

Q. On the estimate which you revised downward? A. That is right.

Q. Now, did you have a conference with Mr. Dowling on that day? A. I did.

Q. Who else was present?

(Testimony of Edward L. Soule.)

A. That took different parts.

Q. What time did you meet?

A. My son Lee and I picked up Mr. Stevens, who had flown down from Seattle and was staying at the Whitcomb Hotel. We made an engagement to meet at our office at 1750 Army street at eight o'clock. My son and I picked up Mr. Stevens at the Whitcomb Hotel, arriving at our place of business at about eight o'clock, and found Mr. Dowling and Mr. Cochrane waiting for us there.

Q. Then what did you do?

Mr. Wrigley: What date was that?

Mr. Moore: December 29th.

A. We had a short talk in my office, and then we proceeded upstairs to the engineering department, to discuss the method of the falsework which the Union Paving Company said that they were going to use for their own use, that they were required to build, which they would have runways on, and on which the workmen would wheel their wheelbarrows and pour the concrete. That was the principal subject and reason for the visit, for that discussion.

Q. You mean up to the drafting room?

A. Went up to what we call the reinforcing engineering department.

Q. This map that you identify here, was that before you at the time, Mr. Soule?

A. We took this original plan showing the [218] outline of the pier, and Mr. Alec Cochrane proceeded to tell me how he was going to build this

(Testimony of Edward L. Soule.)

inside falsework. I took the T-square and a triangle, and as he proceeded to tell me how he was going to do this, I put down the work in here. He said, "I would use a 10 by 10 with about 10 foot centers." And as he would tell me, then I would put down that work.

He told me about the pouring, of the elevations at which it would be required on account of the pouring. The specifications said in instances of big bulk work, in order that the concrete might not heat up too much, and so forth, that you had to limit them to five-foot pours.

We discussed very thoroughly the places at which each of the bars would splice, and, of course, we had to stop the pour at a workman's height in order to weld those bars. That could not be done down on their stomachs; they could be higher, but it would not be very economical. And a discussion was held as to the different welding points. This shows at all the elevations where they had to be welded, so therefore you had to stop the pouring at different places. For example, this bar came down and was broken there. Of necessity, you would have to stop the pour there. These beams came in at this elevation, and here are red marks showing the different elevations at which the pours of necessity have stopped for construction purposes.

Q. Did all this conference take place in the presence of Mr. Dowling?

A. Mr. Dowling was present at all times.

(Testimony of Edward L. Soule.)

Q. Were there any further conversations had up there about this plan of interior framework?

A. Yes, very definitely, very definite discussions, and an explanation was given, because that was the substance of our meetings. We sat down and, as I say, [219] delineated how they were going to do this for their own use.

I remember Mr. Cochrane stating to us, after we had this all delineated out there and they were leading up to the subject of the price at which we would quote on this work—and I remember that Mr. Cochrane remarked, “Now, boys, it looks like a different picture to you now, doesn’t it, that you know the type of falsework that we are going to construct for our own use?”

And then he went on to state that this falsework is to be for the use of ourselves in the pouring of the concrete, supporting these runways, and stated to us that he would in all instances turn this over to us for our own use. The explanation seemed to be very clear to us.

Q. After you got through up in the drafting room where did you go? What did you do?

A. We didn’t clear up that conference until after dinner. We stopped the conference and went to dinner.

Q. To dinner?

A. To lunch, down to Manning’s, on Brannan street. When we came back we went up there and had a further discussion over the points that were brought out in the morning, and further, Mr. Coch-

(Testimony of Edward L. Soule.)

rane explained to us after they built this inside framework, if there was any templating required, that is, if you had to bring the bars out to the exact tolerances as shown on the plans, that should be for our own account. If after they did the bracing, did the construction of this work and did the bracing, and, in our judgment, that bracing was not sufficiently strong—for example, if we desired to put more bars on one side than we did on the other for an unbalancing, then if there was any extra bracing, then that should be for our account.

[220]

Q. That was all discussed at that time?

A. We had a full and complete discussion, and present at that meeting was Mr. Dowling, Mr. Cochrane, Mr. Stevens and myself, and in the room, the engineering room, was Mr. Short, Houden, Ubigau.

Q. After you went up to the drafting room again what then happened, Mr. Soule?

A. After we had a full explanation as to how this was to be done, Mr. Dowling remarked, "Now, boys, you get your figures together on this explanation as we have shown it to you, and we will turn this over to you free of charge for your use in all instances, and Alec and I will take a walk out here and look over the housing project."

They were gone about an hour, and when they came back we went into my room, in the corner, downstairs, and Mr. Dowling said, "Well, now,

(Testimony of Edward L. Soule.)

boys, have you got that price down? What is your final price?"

And Mr. Stevens and I had again looked over our estimate in light of the explanations of their furnishing the falsework, and that estimate in the file shows we calculated, we came to \$23.60 on the basis that the Union Paving Company would furnish the falsework. We felt that we would try to get \$24, so when Mr. Dowling came back and asked us for a price, we started at \$24.

Q. What price did he offer?

A. Mr. Dowling offered us a price of \$21.50 to \$22. Finally, some horse trading went on between us, until Mr. Dowling's price had raised to \$22.25, and our price had lowered to \$22.75, and it looked like we were just in a complete deadlock, because we had dropped below our \$23.60 price. And Mr. Stevens and I had agreed we thought we were getting down to as low as we should possibly go on such a hazardous job. Finally, Mr. Stevens and Mr. Cochrane, [221] who were sitting a little bit to the back of us—Mr. Cochrane suggested, "Why don't we split the difference?" We split the difference, and that became the basis of our bid of \$22.50 a ton.

Q. At that meeting did you have a copy of this bid of December 11th? A. I did.

Q. I will hand you one. There are certain pencil interlineations in there. Whose handwriting are those in?

A. That is in my handwriting.

(Testimony of Edward L. Soule.)

Q. You saw the one that was introduced in court this morning, produced by Mr. Dowling?

A. Yes, sir.

Q. That is in your handwriting, too, is it?

A. That is a duplicate of this one.

Q. Under what circumstances was that handwriting placed on that document?

A. In other contracts it was usual that we get out the contract, and I suggested that we prepare the contract, believing that the form that we generally had there covered the conditions. Mr. Dowling said he wanted to get out the contract. So I therefore took one of these copies, and I know this was my particular copy—I scratched out the \$24.80, and I put on the things that we had agreed to. Paragraph 5 states,

“You are to provide an easy and accessible roadway from the main highway to the base of the piers and abutments as required and a leveled portion around the piers, or a wooden trestle which may be for our use.” Paragraph 8:

“You are to furnish wood supporting frame work.”

Q. That was put in there by you, was it?

A. That was put in there by me.

Q. On the back there is a 7.

A. 7 couldn't be written in that [222] part on account of the space. 7 was turned over to read,

“You are to pour concrete sills as required,

(Testimony of Edward L. Soule.)

in the base of the piers, to support the reinforcing steel mats in the bottom of the piers. On the steel reinforcing mates, the steel shoes, which support the two-inch vertical bars, are to be placed."

Q. Were those various provisions discussed between you and Mr. Dowling at the time you made those interlineations?

A. They were. It was brought right up to date and agreed to right at the time.

Mr. Wrigley: I ask that that statement, that it was brought up to date, be stricken out.

Mr. Moore: It may go out.

Mr. Wrigley: In other words, he can say what was said, but his conclusion that it was agreed to——

Mr. Moore: I made no objection to its going out.

Q. Mr. Soule, you kept one copy of that, did you?

A. Yes, this was to be the basis of the contract.

Q. Mr. Dowling took the other?

A. That is correct.

Q. He drew up the contract?

A. Yes, sir.

Q. You signed that contract when?

A. January 6th.

Q. Was it your understanding at the time you signed it as to——

Mr. Wrigley: I object to the question as to his

(Testimony of Edward L. Soule.)

understanding as calling for an opinion and conclusion.

Mr. Moore: I think it is proper. I might finish the question.

Q. Was it your understanding at the time you signed that contract that you were to put up the framework, or that Soule was to put it up, or that the Union Paving Company were to put it up?

Mr. Wrigley: It calls for an opinion and conclusion when [223] you ask for his understanding.

Mr. Moore: I think it is proper to show his understanding as to what the contract meant at that time, your Honor.

The Court: I will allow it.

A. I distinctly understood, and it was so stipulated on this written form, that they were to furnish it, and we reduced the price from \$28.60 by deducting the amount to \$24.80 and horse trading to \$22.50.

The Court: We will take a recess.

(Recess.)

Mr. Moore: I will offer in evidence at this time the contract, your Honor, which was marked "Plaintiff's Exhibit 22 For Identification."

Mr. Wrigley: Same objection.

The Court: It may be marked.

(Plaintiff's Exhibit 22 For Identification was thereupon received in evidence.)

Mr. Moore: We also offer a copy of the letter

(Testimony of Edward L. Soule.)
of December 11th produced by Mr. Soule and identified by him.

Mr. Wrigley: The same objection.

The Court: Same ruling.

(The document was received in evidence and marked "Plaintiff's Exhibit 23.")

PLAINTIFF'S EXHIBIT No. 23

Los Angeles

Telephone

Portland

Valencia 4141

Houston

[Emblem]

Soule Steel Company

Iron and Steel Products

1750 Army Street, San Francisco

December 11, 1939

Gentlemen:

Re: Abutments and Piers, Pit River
Bridge Relocation of Southern Pa-
cific Railway and U. S. Highway 99

In regard to the labor of installing the reinforcing steel bars, Bid item No. 11, as specified for the construction of the above project in accordance with plans and specifications prepared by the United States Department of the Interior, Bureau of Reclamation, we are pleased to quote you as follows:

1. We are to receive the reinforcing steel bars f. o. b. cars Redding, California.

2. The 2" square bars are to be bent at supplier's mill, all other bars are to be furnished in straight lengths.

3. We are to be responsible for the unloading,

(Testimony of Edward L. Soule.)

checking and handling of said reinforcing steel upon arrival at Redding upon a lot to be provided by you. [by us]* ~~(We estimate the storage lot size should be about 150' x 350' and adjoining a rail track.)~~ [rental of which shall not exceed \$30 per month.*]

4. We will do the cutting, bending and shaping of 2" bars preparatory to welding, loading on to trucks and transporting to jobsite to conform to your construction schedule.

5. You are to provide an easy and accessible roadway from the main highway to the base of the piers and abutments as required and a leveled portion around the piers [or a wooden trestle which may be for our use.*]

6. We will furnish all labor (including insurance) to do the placing of the reinforcing steel, including tie wire and accessories under above bid item No. 11 (but not including welding).

[Figure 7 in circle]

8. [are to furnish wood supporting framework*]

7. You will pour concrete "pyramids" ^ in the base of piers #1, 2, 3, 4, 5, 6 and 7 and/or will furnish and erect wood core forms and/or steel supports, against which the 2" bars can be supported. [over*]

[omit*]

8. We have provided in this proposal for a job engineer 16 months @ \$300.00 per month, which cost will be borne equally.

[*Printer's Note: Words in light brackets were inserted in copy in pencil.]

(Testimony of Edward L. Soule.)

9. Sufficient lights will be furnished by you; also power outlets will be available for our use.

Price: As specified for the above items, the unit price of \$24.80 per ton.

~~If a bond is required, the same will be for your account.~~

Payments are to be made on or about the 10th of the following month for 85% of the value of the work performed during the preceding calendar month, and the remaining 15% to be paid 30 days after completion of our portion of the work.

Note: We are not to be held responsible for failure by delay or default arising from strikes, lock-outs, or other contingencies beyond our control.

If the above is in accordance with your understanding, please accept in the lower left hand corner, and it will constitute an agreement between us.

Sincerely yours,

SOULE STEEL COMPANY

By EDW. L. SOULE.

Accepted:

UNION PAVING COMPANY.

By

[Fig. 7 in circle*].

[You are to pour concrete "sills" as required, in the base of the piers to support the reinforcing steel mats in the bottom of the piers. On the steel reinforcing mats, the steel shoes, which support the 2" vertical bars, are to be placed.*]

[*Printer's Note: Words in light brackets were inserted in copy in pencil.]

(Testimony of Edward L. Soule.)

ELS:DL

Quotations subject to change without notice. All sales, contracts or agreements subject to strikes, accidents or causes beyond the Company's control

[Endorsed]: Filed 4/15/43.

Mr. Moore: I think that is all at this time.

Redirect Examination

Mr. Wrigley: Q. Mr. Soule, you were shown this exhibit, Defendants' Exhibit WW, and you stated that that was the first time that you had a statement of any amounts from Union Paving Company, is that correct?

A. Our Mr. Stoddard went down in there to the books and he handled the situation. I the rec- [224] ord of it speaks for itself in respect to the——

Q. I think the record does speak for itself, but you testified that was the first statement you had from the Union Paving Company giving figures in response to counsel's question. Now, is that correct? A. I presume that is correct.

Q. Is that correct, that you so testified, that that was the first statement that you received?

A. I think that is correct.

Q. Now, isn't it a fact that many, many months before this—nine months before—you had a detailed statement from the Union Paving Company showing the amount due at that time?

(Testimony of Edward L. Soule.)

A. In respect to your furnishing of the false-work?

Q. Yes. A. No, that is not correct.

Q. Had you ever received any statement prior to that giving the figures up to that date, the date of the statement; the work was not done, so you could not give a final statement until the work was done, but you had a statement up to the date of the statement of the work that was completed, isn't that correct, Mr. Soule?

A. Not to my knowledge.

The Court: What is it you are looking for?

Mr. Wrigley: A letter of January 11, 1941, from Desmond to Soule Steel Company, giving a statement of the figures up to that date.

The Court: Do you know anything about that, Counsel, without time being consumed here?

Mr. Moore: I do not remember. It seems to me there was a statement, a partial statement made by Desmond at one time, but I do not remember the date.

Mr. Wrigley: My record shows it in evidence. I am just wondering where it is. I will have to pass that. My record shows it in evidence, dated January 11, 1941. Where it is I [225] do not know.

The Court: Your record shows it in evidence. Does the Clerk's record show it in evidence?

Mr. Wrigley: The Clerk does not seem to have it. We have so many records here, I do not want to

(Testimony of Edward L. Soule.)

take the time. My record here shows it in evidence, the date and everything else.

The Court: Have you a copy?

Mr. Wrigley: No, the copy I have is in evidence.

The Court: It isn't in evidence, unless the Clerk took it home.

Mr. Wrigley: No, I don't think the Clerk would do that. I am more inclined to think we have it here among these exhibits, and I just can't locate it.

Q. You testified Mr. Soule that sometime—I didn't get the date from your testimony—but in October or November, or at least prior to January 6, 1940, you reached an estimate of the cost of doing certain work? A. Yes, sir.

Q. Did you compare that cost with the later cost? Have you that cost sheet with you?

A. I don't quite understand that question.

Q. Have you got the statement showing how you arrived at your cost?

A. You mean estimate of original cost?

Q. Yes.

A. Yes, we have. There are several estimates. There was what we called our going-in bid. That was prepared about—finally completed about September 29th, remembering the bid opening was on October 5th. In other words, that was a summarized statement giving up time to call on each of the contractors and to bring that into coordination with what each of the contractors were going to do and what we were supposed to do. That was

(Testimony of Edward L. Soule.)

our original bid, and then after Mr. Dowling got the job, then we [226] coordinated his handling of the work, together with what we had to do, and then we made revised estimates.

Q. Now, isn't it a fact, Mr. Soule, that omitting the interior falsework erected by Union Paving Company, the cost for doing the work that Soule Steel Company did averaged slightly less than \$6 a bar weighing 900 pounds up there on that job?

A. That is not correct, and I will explain why it is not correct, if you so desire.

The Court: You may explain your answer if you wish.

The Witness: There may be sections which would go in cheap, because the bars are very—repetitive work for a short time might make some cheap prices, but remember that you have to do unloading, you have to do unloading, you have to do the cutting and the bending and the shaping of the bars, and the putting on of clamps, receiving the clamps again, moving them on up—you have to have an indirect cost to the job, and an administrative cost that has to be added on there, and it isn't any particular cost on the job that constitutes the cost of placing those bars.

Q. The placing of the bars was done by men who received wages, was it not? A. Correct.

Q. And didn't you furnish a certified payroll to the United States Government, showing every penny that you paid out in wages?

(Testimony of Edward L. Soule.)

A. We did.

Q. And those are what you call direct costs?

A. Those are the field direct costs.

Q. What indirect costs did you have other than those?

A. You would have an indirect cost of, for example, the depreciation on two crawler cranes. You have got the electricity that goes to make up the running of your motorized equipment. You have got the hoisting, these breakages that occur, [227] and repairing, and in the general term of manufacturing or handling a job is what we call indirect—all of those intangible things that you can't put directly to labor. Then, in addition to that, is the administrative part.

Q. Did you ever make a statement up showing what this job costs? A. We did.

Q. Have you that statement with you?

A. I have not.

Q. Will you produce it?

A. If my counsel states so, we will do it.

Q. And that statement shows the direct cost and the indirect cost?

A. That is broken down into the units that were originally set up in the job.

Q. Now, did Union Paving Company ever submit any plans or drawings drawn by it, or someone for it, showing how any of the work was to be done by it up there?

A. We did in this conference, we explained just before the recess.

(Testimony of Edward L. Soule.)

Q. No, you testified those were drawn at your office by your men, but did they draw up any which they submitted at any time?

A. That would be known by Mr. Stevens, who was on the job. He could testify to that.

Q. You were present at these conferences——

A. No, I was not.

Q. I am talking about the conferences before the contract of January 6, 1940.

A. The one which I explained and we delineated on—the exhibit which you have directly in front of you—is the one that was made out prior to the signing of the estimate.

Q. By Union Paving Company?

A. Yes, that is correct.

Q. And they brought it down to your place of business?

A. No, they came to our place of business——

Q. Isn't it a fact that your testimony showed that was made up [228] by your own draftsmen and architects?

A. My testimony shows that I was at the drafting board, a long drafting table, and I put onto that drawing the information that was given to me by Mr. Cochrane.

Q. But did the Union Paving Company ever prepare any plans or drawings which they brought down there, as to how any work was proposed to be done?

A. They brought no drawings to me, but they

(Testimony of Edward L. Soule.)

delineated on the drawings that I had at my place how they were going to do it.

Q. Now, after you had this series of discussions starting October 4th and running through to December 29th, you signed a written contract to do certain work, didn't you? A. Yes, sir.

Q. And you read it before you signed it?

A. Yes, sir.

Q. And you observed that it was totally different from anything that was in any offer, isn't that a fact?

A. I didn't get that last sentence.

Q. You noticed that the contract you signed was totally different in almost every particular from any written offer that you had signed previously, isn't that a fact?

A. I noticed distinctly that many of the phrases in the letter of December 11th are identical with the ones that are in the contract. The rest of it is more in a legal phraseology, I take it.

Q. Were there any attorneys involved in this matter?

A. I understood that Mr. Dowling had an attorney in his office who worked up the contract.

Q. From whom?

A. He told me he had an attorney in his office.

Q. You did not have any contacts with any attorneys at all, did you?

A. My contact was direct with Mr. Dowling.

Q. Mr. Dowling? A. That is right.

Q. Showing you this exhibit which has been

(Testimony of Edward L. Soule.)

marked "Plaintiff's [229] Exhibit No. 23," you state that you had that and made the pencil notations on it on the 29th of December, 1939?

A. I made that statement, that is correct.

Q. And on January 6th you signed a written statement for this work? A. That is correct.

Q. Where was that signed?

A. In Mr. Dowling's office.

Q. And you read it before you signed it?

A. Yes, sir. I had previously received an outline of the contract and it omitted the strike clause. We compared the conditions with the contract, and when I went to Mr. Dowling's office on January 6th I noted that that strike clause had been inserted.

Q. Now, where was there anything in your contract, as you state, in that bid that said, "The subcontractor at its own cost agrees to provide all labor, materials, tools and equipment or other means and promptly unload all reinforcement bars from cars delivered at Redding, California, check and haul the same to the jobsite and provide suitable warehouse or other means of protection for any material requiring storage or protection—" where is there anything in your offer to show that this was to be in accordance with the provisions of paragraph 23 of said specifications applicable thereto?

A. Ours is a breakdown in detail in the way that we have many times done that, and I would answer your question, reading, "In regard to the labor of installing the reinforcing steel bars, bid item No.

(Testimony of Edward L. Soule.)

11." Then if you follow through the specifications, it tells you what you have to do relating to the reinforcement bars in respect to bid item 11.

Q. You use the term "bid item No. 11." Before you used that, you saw the specification, didn't you?

A. Yes, sir.

Q. And didn't bid item No. 11 say you were to furnish the re- [230] inforcement steel; you get no extra bid for supporting, or anything else? Wasn't that bid item No. 11?

A. That was left up to the contractor and the subcontractor as to the means as to how it was to be supported.

Q. Yes, but doesn't the contract, in Item No. 11, say that is to be included in it at no extra cost?

A. No mention is made as to how you shall do that, and that must be up to the general contractor as to the method of support.

The Court: Was that the 2-ton rails?

Mr. Wrigley: I didn't get your Honor's statement.

The Court: This item you are inquiring about.

Mr. Wrigley: Item 11 is the item under the bid which says you will furnish everything to reinstall the reinforcing rails or reinforcing bars.

The Court: When you used the word "rails" I had in mind——

Mr. Wrigley: If I used "rails," that was improper. I should have said reinforcing bars.

Q. I will ask you to read 66 and state if that is

(Testimony of Edward L. Soule.)

not the same as bid item No. 11, reinforcement bars?

A. This is the particular subsection entitled "Reinforcement bars," attached to the specifications.

Q. And which was bid item No. 11?

A. That shows right in the front of this bid item No. 11 reads—Item No. 11—Placing reinforcement bars, 10,930 pounds at—then this is carried out.

Q. So your bid, in accordance with bid item No. 11, referred to the placing of the reinforcement bars according to the United States Government specifications, didn't it?

A. It refers to the plans and specifications of the Government.

Q. You noticed also, didn't you, that the contract, before you [231] signed it, contained an express provision that the subcontractor at its own cost and expense agrees to provide all labor, materials, tools, accessories and equipment and perform and observe all the provisions contained in paragraph 66 of said specifications?

A. That is right, and having in mind our other understanding that the Union Paving Company were going to furnish the supporting, the falsework, and thus, according to their statement, they were going to give us the use of that at all times free of cost for supporting our reinforcement bars.

Q. Before you signed that contract of January 6th, you knew their lifts ran varying from 5 feet in the base to not to exceed at the greatest depth, I think it was, 10 feet in most of the piers?

(Testimony of Edward L. Soule.)

A. Yes, 10 or 15 feet, something like that.

Q. And that so far as their work was concerned they only needed scaffolding or staging enough for that amount of concrete at any time; you knew that, didn't you? from the specifications?

A. That is correct, but they said they would carry this on up to support our bars. That was our conversation and our understanding that we made on December 29th, as delineated by our plan—on the plan, and by the conferences that we had.

Q. Now, in your offer, as you refer to it, of December 11th, you wrote originally in typing, "You will pour concrete 'pyramids' in the base of piers 1, 2, 3, 4, 5, 6, and 7 and/or will furnish and erect wood core forms and/or steel supports, against which the two-inch bars can be supported." That was typed. And then the portion, "will pour concrete 'pyramids' " was stricken out and you wrote in there in pencil. "are to furnish wood supporting framework." That was in your own handwriting, wasn't it?

A. That is right, and that needs just a little explanation for clarifications, if you desire that. [232]

Q. No, that is the wording as is stated here.

A. Yes, we must clarify that, because that sentence distinctly stipulates that you shall furnish all of the wooden falsework.

Q. In your bid, but is there anything like that in the contract? The contract does not say, "You will furnish it."

(Testimony of Edward L. Soule.)

A. The contract is not concerned with detail of construction in respect to an article like that. There may be as many supporting devices, I may say, as there are different engineers, and, therefore, it can be done in many different ways, and the Department of Interior does not stipulate as to how you shall do it, but it says you must, in its final conclusion, arrive at this result.

Q. You know this contract, before you signed it, contained a provision that the contractor would construct a wooden trestle over and about the base of all pier excavations and construct wooden cores shown in the plans which may be used by the subcontractor as supplementary support for reinforcement bars?

A. That is correct. Those are our words, I think, on this December 11th.

Q. And there is totally omitted from this contract your wording as to the wooden framework; that is all omitted from here, isn't it?

A. Oh, it did go on to say that you shall make ready those piers, and that is the part that I constructed as to the furnishing of this falsework. When you make this ready and have done these things which you have agreed to on here and have built this there, it is then made ready to receive the reinforcement bars, so that the two are synonymous in my understanding.

Q. You also read the provision of this contract, "The contractor agrees to pay the subcontractors

(Testimony of Edward L. Soule.)

\$22.50 per ton for doing all [233] work necessary and incidental thereto and for furnishing all tie wire, clamps and supporting devices."

A. Let us define what supporting devices are. Supporting devices in the common language of the placement of reinforcement bars means the devices, if required, to separate this layer from that layer, or if we pour it from the base of a footing, you must hold it up by either—the word was used "dough-balls," which was a new term to me—we used it in concrete blocks or supporting members, or some form of a metallic means of holding that up. The supporting devices are the ones that hold it up, usually, from the bases or the supporting devices which holds it away from your forms. I think if you will give the complete sentence used in your specifications, and it names a considerable number of them, and then it puts in the general form of "supporting devices." And if you will look that up, which I did, in your dictionary, the devices is the one applying to the others that are mentioned previously on there, and I think you will find that the custom or practice in connection with all reinforcement bars.

Q. Mr. Soule, you have been in the business of placing reinforcement bars for many years, haven't you?

A. Since 1908.

Q. Did you ever have a job prior to the Pit River job where the reinforcing bars were placed on an incline or slope, as on that job?

A. Many instances. I built many piers and viaducts, and so on.

(Testimony of Edward L. Soule.)

Q. Yes, that is my information. And where you have, as on the Pit River job, three tiers of steel two-inch, further up two, whatever is used, wood in that case, to separate the bars, to hold them apart, do we understand that you call those supporting devices or separating devices?

A. It is a combination of both. [234] When you separate the—when you have the inside bars supported, all you have to do with the others is to separate them apart.

Q. Aren't they called separators in steel construction work?

A. They are both supporting and separating.

Q. Aren't they known also as separators in the matter of erection of steel?

A. No, because you are speaking directly of an inclined bar, and that horizontal component has to go some place, and therefore it can go no other place except against that separator, so therefore it performs a double function of a separator and a supporter.

Q. Then the inside rail or bar which is inclined is normally called a template, isn't it?

A. Yes. That template then becomes a part of the inside falsework. A template is simply an adjunct to build it out to an exact tolerance.

Q. Yes, and that template, in turn, is held in place by being affixed one way or another to interior falsework of some kind, isn't it?

A. That is right.

(Testimony of Edward L. Soule.)

Q. And the interior falsework is the real supporting device to hold that steel up, isn't it?

A. It might be attached to the outside, too.

The Court: Time for adjournment. We will adjourn until tomorrow morning at 10:00 o'clock.

(Thereupon an adjournment was taken until tomorrow, Friday, April 16, 1943, at 10:00 o'clock a.m.)

[Endorsed]: Filed April 16, 1943. [235]

Friday, April 16, 1943—10:00 O'Clock A.M.

EDWARD F. SOULE

recalled.

Redirect Examination (resumed)

Mr. Wrigley: Q. Mr. Soule, yesterday you were shown this exhibit, which has been marked "Defendants' Exhibit WW," dated September 10, 1941, and you stated in reply to that that that was the first statement you had from the Union Paving Company giving the figures as to their charges. That was your testimony at that time, was it not?

A. I believe that is correct. I think in the general policy of this, for clearness, I think I also said the records would take care of themselves, would speak for themselves. The first known thought that we had in connection with charges for the falsework part was on or about October 15, 1940. Then there

(Testimony of Edward L. Soule.)

seemed to have been the thought that we were to be charged with the falsework.

Q. Showing you Defendants' Exhibit Y, which was February of 1941, and which purports to be a statement of the charges up to January 11, 1941, and which you testified was received by Soule Steel Company, isn't that correct?

A. I said that I presumed this was received.

Q. So as of that date, then, Soule Steel Company had a statement of the charges up to January 11, 1941?

The Court: For this falsework?

Mr. Wrigley: For this falsework.

The Court: Read it.

Mr. Wrigley: Does your Honor want the whole letter, or just that portion?

The Court: The portion that you rely on.

Mr. Wrigley: (Reading) [236]

"We herewith submit the apportionment of the charges due from you for this work covering the period from January 31, 1940 to January 11, 1941, namely:

"Furnishing labor and materials, hauling, installing, moving and re- installing boom for hoisting and placing reinforcing steel and ma- terials for structures.			
	\$	667.82	
Plus 10% overhead		66.78	\$ 734.60
<hr/>			
"Furnishing labor and materials and installing electric hoist, with com- munication signal systems for same, and maintenance			
	\$	73.78	
Plus 10% overhead		7.38	81.16
<hr/>			

(Testimony of Edward L. Soule.)

"Furnishing labor and materials for the construction of falsework and supporting devices necessary to hold reinforcing bars in place		
	\$ 35,560.58	
Plus 10% overhead	3,556.06	39,116.64
<hr/>		
"Furnishing additional guy lines necessary to support added load of boom, including sales tax		
	\$ 552.70	
Plus 10% overhead	55.27	607.97
<hr/>		
"For invoices heretofore forwarded to you for charges other than the above		
	\$ 454.91	
Plus 10% overhead as billed	40.90	495.81
<hr/>		
		\$41,036.18"

The Court: What is the date of that?

Mr. Wrigley: The date is February 24, 1941.

Q. So on February 24th, or thereabouts, you did receive a detailed statement?

A. I don't call this detailed; I call this your general—I would call this a general billing leading up to what we might call a settlement on your part as to our taking a part of that apportionment. The detail was gone into by our Mr. Stoddard when he went down into your office, to the office of the Union Paving Company.

Q. Can you fix the date Mr. Stoddard went down there for the first time to go over any figures?

A. I would have to refer to the record for that. [237]

Q. Isn't it a fact that Mr. Stoddard did not go

(Testimony of Edward L. Soule.)

down there to look over the books and verify the correctness of the figures until after the statement one year later?

A. I presume you are about right on that.

Q. And Mr. Stoddard did not go down there to check any figures in 1941, the early part of that year?

A. I think you are correct.

Q. Your testimony yesterday to the effect that you never had any statement of any kind quoting figures or charges from Union Paving Company prior to the statement of September 10, 1941 is not correct?

A. These would be very nebulous in our mind as to what they were about. They were quite a surprise to us.

Q. They were figures, weren't they, showing the amount of their demand?

A. Nothing that we could get our hands on, because we had nothing to do with that construction during the time that it was constructed. Just to give those figures out to us was placing us at quite a disadvantage to know what they were all about.

Q. Nevertheless, prior to September of 1941, they gave you figures and showed you the amount of their demand, didn't they?

A. It didn't mean very much to us.

Q. They gave it, though, didn't they?

A. If these letters were received, they were then in our possession and the record must stand if we have received those.

(Testimony of Edward L. Soule.)

Q. Do you mean that you received them?

A. No, I think I said that we received those.

Q. Now, look at the Exhibit OO, acknowledging receipt of it.

A. Yes, this is Mr. Stoddard's signature.

Q. So you did receive them at that time?

A. That is right. [238]

Mr. Moore: What is that?

Mr. Wrigley: OO, which is the acknowledgment of the receipt of that by Mr. Stoddard.

Q. Mr. Soule, you produced yesterday a roll of papers, which have been marked Plaintiff's Exhibit 22. Have you the manilla drawing that was made in your office in the presence of Mr. Dowling? I withdraw that statement. After you had a small rough sketch, you then prepared in your office on manilla paper large scale drawings made by your draftsman. Have you those in court?

A. I think there is an inaccuracy in connection with that. What we do is to put down a piece of manilla paper on top of our table to work on, and this is the one, the one that you have, that was used to do that work. We had no manilla lay-out on it. This was the one that was sent from Los Angeles and the exact one we did the work on.

Q. Who made up this drawing?

A. An engineer by the name of Mr. Cramer, in our Los Angeles office, made the original skeleton lay-out of the pier, and put in the bars. The rest of it was done by me, personally.

(Testimony of Edward L. Soule.)

Q. You haven't a large-scale drawing on manilla paper?

A. No, no, that is— I say again the draftsman's procedure is to put down a piece of manilla paper. Then that color shows through this piece, here, and that is probably why it was thought to be manilla paper. This is the exact and the one that we worked on.

Q. Isn't it a fact that the only drawing on large scale in the drafting room in your office, in the presence of Mr. Dowling, on which any notes or sketches were made, relates to, we will say, the 10 by 10's that were then being discussed, related 10 by 10's only in the base of the piers?

A. No, that is not [239] the case. That shows these were extended all the way up.

Q. And this, you say, was the drawing that you had at that time?

A. That is the exact drawing, yes, sir.

Q. What date did that come back from Los Angeles?

A. That came back—that was brought up to us by Mr. Holcomb when he came up—I will try and fix the date about the time we received that—came up somewhere between November 4th and November 12th—say November 4th and November 14th—because Mr. Holcomb went on the job with Mr. Stevens on November 16th or 17th.

Q. You fixed the date of the conference at Sacramento as November 4th?

Mr. Moore: No, that is not correct.

(Testimony of Edward L. Soule.)

The Witness: October 4th, the day before the bid-letting, which was 10:00 o'clock in the morning of the 5th.

Mr. Wrigley: Q. You fixed, you say, first a conference in the day time and then a later conference in the night?

A. A conference in the evening.

Q. Where did the first conference take place?

A. In Mr. Dowling's room. We were all stationed in the Senator Hotel. He had a room. We looked on the register and found what room he was registered in, and we went in to see him in his room.

Q. Where did the second conference take place?

A. In his room. He had gone to bed.

Q. Is your recollection clear on that?

A. I don't get your question.

Q. Is your recollection clear on that?

A. Yes, sir.

Q. Isn't it a fact that you and Mr. Mahon casually ran into Mr. Dowling in the lobby of the hotel and asked him if you [240] might submit a figure?

A. That might have been a bare possibility, but that is not my recollection of it. I am positive on the second one Mr. Dowling was in the room.

Q. Late that night?

A. And he explained he would save his energy a little bit by lying down in bed.

Q. And that was almost midnight, wasn't it?

A. I would guess it was about 11:00 o'clock. We had many people to see and I didn't keep track of the time within a half hour.

(Testimony of Edward L. Soule.)

Q. Now, coming to this drawing again, which you said was prepared in Los Angeles and sent up to your San Francisco office——

A. Prepared in outline.

Q. How do you fix the date?

A. That it was sent to us?

Q. Yes.

A. I fixed the date because I had previously sent a set of plans and specifications very promptly after the letting of the contract to our manager, Mr. Dawson, in Los Angeles, and they prepared the estimate——checked our estimates of quantities——and we desired a check estimate on our figures, and in making a check estimate on the figures they prepared this drawing, which Mr. Holcomb brought back with him. I called for Earl Stevens to come to San Francisco on September 4th. He was to our office between September 4th and September 14th, and then they went upon the job.

Q. What quantities do you refer to, quantities of what?

A. That is the quantities of reinforcement bars, in the different locations of the job. We divided it up into the base of the piers, and then we took three lifts on up to each one in respect to cost.

Q. Any other quantities drawn off?

A. We were figuring on the cost of the reinforcement bars.

Q. Weren't all those quantities shown on the plans and specifica- [241] tions——

A. No, they were not.

(Testimony of Edward L. Soule.)

Q. And summarized in the call for bids?

A. They were not.

Q. You read the plans and specifications over before that date?

A. Yes, sir. The total quantity given was about 5500 tons, but that was not segregated into the different component parts of the job.

Q. Do you know Harry Dohrman?

A. Yes, sir.

Q. He was an architect, or just a draftsman?

A. He was an architectural draftsman with our company.

Q. Isn't it a fact that on the 17th day of November he, in your office, in the drafting room, drew up plans on this work so far as the reinforcing steel was concerned?

A. Applying to what part of the work?

Q. The reinforcing steel part of the work.

A. He did not.

Q. What date did he prepare any plans for reinforcing steel?

A. There were no plans. The Government got out the plans. The Government shows all of the plans in the attachments to the specifications; a complete set of plans is given there. That is a function for the Government. We could only interpret and take apart for our use in calculation the plans of the United States Government.

Q. This set of plans was not prepared by the Government, was it?

A. That is only one plan made by our office.

(Testimony of Edward L. Soule.)

Q. Yes.

A. That is not complete in any sense in connection with that particular pier. Only the 2-inch bars are shown on that, and only portions of the two-inch bars.

Q. Now, didn't Mr. Dohrman, your draftsman, on November 17th, prepare a like drawing to that on manilla paper?

A. I think you have reference to a profile drawing of the piers, which was prepared on or about that time to show the elevations, an en- [242] larged profile from which we made a study of the job.

Q. And that was made by your Dohrman on November 17th—

A. I do not recollect by whom that was made. We had one for study made out to show distances and elevations.

Q. And wasn't that the only drawing that was in your office at any time that Mr. Dowling was down there?

A. That is not correct.

Q. Have you that profile drawing that Mr. Dohrman made?

A. We might have it, but I would have to search our files for that.

Q. Have you had any occasion to see it since then?

A. I have had no occasion—we had it up on our—we had it upon our wall and put in red color as the steel was placed and the concrete was poured, in order to watch the releases of reinforcement bars to enable us to keep the job going well.

(Testimony of Edward L. Soule.)

Q. Wasn't that drawing a drawing that was used down there at the time Mr. Dowling was down there, when you were talking about the figures and how the steel would be placed?

A. That was put up on the wall and reference was made to that drawing in respect to the height of the piers, and whether they were going to construct a bridge across the river, and so forth, to try to develop how they were going to do the work in the field.

Q. When was that taken off the drafting table and put on the wall that you speak of?

A. We took it off the drafting table and put it on the wall in relation as to where we could best use it.

Q. That was at a later date that that was done, wasn't it?

A. My memory is it hung on the wall when they were——

Q. When Mr. Dowling was there?

A. That is correct.

Q. That particular profile, as you call it, shows that the false- [243] work or framework interior in wood was only in the base, so far as Union Paving was concerned at that time, wasn't it?

A. There was no falsework shown on that drawing. That was entirely a profile drawing to make a study of the job. It showed no falsework or any other details.

Mr. Wrigley: No further questions of this witness.

(Testimony of Edward L. Soule.)

Recross-Examination

Mr. Moore: Q. Mr. Soule, you fixed a date at the time Earl Stevens came down there as September 3rd or 4th. Are you correct in that?

A. November. Excuse me. I am speaking of November. It had to be after the Letterman job. I am incorrect on that. I stand corrected.

Mr. Moore: That is all.

Mr. Wrigley: Mr. Stevens.

LESTER EARL STEVENS,

was called as a witness on behalf of defendants under Rule 43 of Federal Rules of Procedure; sworn.

Mr. Wrigley: I am calling Mr. Stevens under Rule 43.

The Clerk: Q. Will you state your name?

A. Lester Earl Stevens.

Direct Examination

M. Wrigley: Q. I believe the previous testimony and statements of counsel were to the effect that you were a partner with the Soule Steel Company on this particular job; that is correct, isn't it?

A. Yes, sir.

Q. Starting with the date on that contract, January 6, 1940, give us the periods of time that you personally were on that job.

A. I left Seattle on January 9th and I stopped at Redding, and then came on through to San Fran-

(Testimony of Lester Earl Stevens.)

cisco, and returned to Redding [244] about the 15th of January, 1941. I was there until the latter part of May, and I took two or three weeks and went to Seattle while Mr. Sparling was on the job. I returned and was there practically constantly until February 18, 1941.

Q. That took you up to February 18th, 1941. The job was not complete at that time, was it?

A. Not quite complete.

Q. From February 18, 1941 you were away?

A. February 18th I went to Seattle.

Q. After that were you on the job? A. No.

Q. Then you were on the job starting with June of 1940, roughly, to February 28, 1941, covering that period, then? A. Yes, sir.

Q. You knew Mr. Morisette? A. Yes, sir.

Q. And you saw him more or less every day, didn't you?

A. Yes. Let's see. Mr. Morisette came on the job, I think, in July, the latter part of June.

Q. He came the latter part of June, didn't he, while Mr. Cochrane was still there?

A. Yes, sir.

Q. You had many conversations with him after that while you were there, from the time he came in June, or whatever time he came, until you left the following year, in February? A. Yes, sir.

Q. Isn't it a fact that almost continuously from the time that Mr. Morisette took charge, there, until you left he was complaining about delays by the Soule Steel Company?

(Testimony of Edward L. Soule.)

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Q. Isn't it a fact that almost continuously from the time that Mr. Morisette took charge, there, until you left he was complaining about delays by the Soule Steel Company?

(Testimony of Lester Earl Stevens.)

A. No, I wouldn't agree to that.

Q. Wasn't he, we will say, in the month of August, 1940, making complaints to you about the fact that the work was not progressing because you were not erecting the reinforcing steel?

A. We may have had discussions on certain units, but we had to have time to do our portion of the work. [245]

Q. It is a fact, isn't it, that he was complaining about your holding it up?

A. The question was mentioned that they were waiting on us at certain portions of the work.

Q. And isn't it a fact that it got so bad, by the month of September, that he not only complained to you, personally, but he wrote to the head office in San Francisco a written report complaining about you holding up the job, and that was in turn referred back to you by Mr. Soule?

A. That may have been.

Q. And almost continuously from September on he was making, or Mr. Hunt was making written demands and requests to speed up that work?

A. I don't remember more than one.

Q. Which one do you remember?

A. Mr. Morisette wrote a letter to—I don't remember whether it came to our office in San Francisco and returned back to me, or whether it came direct to me, but that is the one letter I recall.

Q. That was in September, 1940, wasn't it?

A. I don't remember what date that was.

Q. And didn't thereafter his complaints get so

(Testimony of Lester Earl Stevens.)

bad that they served on you, and you signed, receipted for, an absolute written demand that you proceed when you were working on Pier 5?

A. That was after October 15th, along about the 25th, 20th to 25th.

Q. And following on from that time until you left in February, wasn't Mr. Morisette continuously complaining about the fact that you were not cooperating and erecting the steel? A. No, no.

Q. Isn't it a fact that both Mr. Morisette and Mr. Hunt demanded that you go ahead and place the reinforcing steel on both Pier 4 and Pier 5, and you said, "It can't be done, because there is no falsework to lean the steel against"?

A. That was taken up with San Francisco, and I was not in a position to go ahead [246] until I was O.K.'d by the home office.

Q. But Mr. Hunt and Mr. Morisette made that demand of you, didn't they?

A. That was late in October.

Q. Now, isn't it a fact that at that time you—when I say "you" I refer to the employees of the Soule Steel Company—actually furnished the labor and erected some interior falsework or scaffolding there?

A. Pardon me. Which pier are you referring to now?

Q. 1940.

The Court: The question was, "What pier are you referring to?"

Mr. Moore: The period.

(Testimony of Lester Earl Stevens.)

Mr. Wrigley: Is he saying "pier" or "period"?

The Witness: Pier—which one of the piers?

Mr. Wrigley: Q. The date October 25, 1940 and the pier was Pier No. 5.

A. Yes, there was considerable disturbance on the job just at that time, and Mr. Soule was in Washington, as I remember, and some of them had one or two men working on that pier. Now, whether they were working on framework or bracing—it was just until we got word back from the San Francisco office.

Q. How much of a crew did you have on the job at that time?

A. I would say there was possibly fifteen to eighteen men.

Q. Now, isn't it a fact at that time you had only six men up there? A. On the job?

Q. Yes, working erecting steel, or any other physical work on the ground.

A. No, there was more than that if there was work to be done.

Q. Have you the records on your payroll on the date October 25, 1940?

A. I think I could locate it. I don't have it with me, [247] personally.

Q. Isn't it a fact that on that date, Friday, you had two men only placing steel on Pier 3 for four hours and three men for the full time, eight hours, that on Pier 5 you had two men erecting scaffolding for one full shift of eight hours?

(Testimony of Lester Earl Stevens.)

A. I would have to check my records in order to answer that.

Q. What do you mean, you would check your records here in court?

A. I would have to check the daily time sheets.

Mr. Wrigley: We would ask this witness to check his payroll showing the number of men on that day and see whether they furnished correct sworn reports to the Government. I will ask them to produce that this afternoon.

Q. Now, didn't Mr. Hunt and Mr. Morisette both ask you personally to install that falsework to hold up your steel?

Mr. Moore: I think your question is indefinite. When?

Mr. Wrigley: He can answer for the whole period and then we will fix the time afterwards.

A. No, I wouldn't answer it that way.

Mr. Wrigley: Q. Would you say that Mr. Morisette never at any time asked you to install the interior falsework there?

A. That was discussed after October 18th.

Mr. Moore: Pardon the interruption. 1940?

The Witness: 1940.

Mr. Wrigley: Q. You say it was discussed. Who had that discussion?

A. Mr. Dowling, Mr. Morisette, and I don't remember Mr. Hunt being with us.

Q. And yourself? A. Yes, sir.

Q. Where did that discussion take place?

A. On Pier 6.

(Testimony of Lester Earl Stevens.)

Q. Didn't you at that time agree to go ahead and do that falsework? A. No. [248]

Q. And didn't you after that proceed to do it and have your men do it? A. No.

Q. And didn't you have these orders countermanded later from the San Francisco office to stop doing it?

A. No. The only time we worked on it was on Pier 5 on October 25th, until we got word back.

Q. After you had the conference with Mr. Dowling and Mr. Morissette, didn't you that same night come to San Francisco?

A. I don't remember.

Q. Do you remember that after coming to San Francisco you phoned back the next day to Mr. Klein and said that you had had a conference with Mr. Soule and that Soule Steel Company was not going to do that falsework inside and instructed Mr. Klein to take the men off the job that were doing that work?

A. Those instructions may have been given; I wouldn't know the exact date without checking.

Q. Showing you first an exhibit marked Defendants' A, I ask you if that correctly depicts the job and refreshes your recollection as to the appearance of that particular pier, which is Pier 4, at the elevation shown? A. Yes, that looks correct.

Q. Showing you Defendants' Exhibit B, purporting to be Pier 4, I ask you if that does not refresh your recollection as to the appearance of Pier 4 at that elevation. A. Yes.

(Testimony of Lester Earl Stevens.)

Q. Now, referring specifically to what I denominate the separators holding the two bars of steel apart, had that any connection whatever with the pouring of the concrete?

A. When you call it separators, now, which portion are you referring to?

Q. These separators up here (indicating)——

A. Spacers.

Q. You call them spacers?

A. Spacers, yes.

Q. Were they used in the pouring of the concrete?

A. Just to [249] keep the bars spaced while they were pouring.

Q. Not to pour the concrete; to keep the bars of steel spaced? A. That is correct.

Q. Looking next at what I would call the template—— A. Yes, sir.

Q. Against which the bars lean, was that used in any respect, whatsoever, so far as the pouring of concrete was concerned, except to hold up the bars?

A. No. You may have fastened to it at times, but principally to support the steel.

Q. Leading from the falsework inside out to the template there are various braces shown on this Exhibit B. Do they serve any purpose, whatsoever, in the pouring of the concrete?

A. No, they were just put there for stiffeners.

Q. And they were all put there by the Union

(Testimony of Lester Earl Stevens.)

Paving Company and they did furnish the material as well as put them in there, didn't they?

A. We placed them templates ourselves—any braces running out, stiffeners—and we sometimes used Union Paving Company carpenters to put them on, and in some instances we used our own men, or put their men on our payroll. That was all approved, those charges for those templates.

Q. The Union Paving Company employed carpenters who put those templates into place, didn't they?

A. Yes, they did.

Q. And other carpenters also put in these braces, didn't they?

A. On that particular brace you are pointing to, There, I rather think we put that on.

Q. When you refer to "we"—

A. Soule Steel.

Q. What class or character of men employed by Soule Steel Company would do that type of work?

A. Steel workers.

Q. Steel workers did the carpenter work, then, on this job?

A. In some instances they did. [250]

Q. Showing you again the exhibit, Defendants' Exhibit A, Pier 4, which purports to show the tops of steel at elevation 903, the next tier of steel at 893, and below that is marked an elevation 863, tell us if there is any concrete work being done at those elevations.

A. At elevation 863 I think your runways is on this elevation.

(Testimony of Lester Earl Stevens.)

Mr. Moore: Will you speak a little louder?

The Witness: On elevation 863 the runways for the concrete is on that elevation as it appears there in the picture.

Mr. Wrigley: Q. In other words, at elevation 863 would be the runways where the concrete is first received from the tower inside, from which it is then taken to a lower level, is that right? A. Yes.

Q. Above the elevation 863 was there any concrete work at all going on in that picture?

A. Your equipment would be hoisted in over that and lowered down through. You had men working up on those higher elevations.

Q. Men doing what?

A. Handling equipment down in to pour the concrete.

Q. What type of equipment do you refer to?

A. Well, elephant trunks, chutes, various equipment that was brought in. It had to come in over the top.

Q. Weren't they already in there at the bottom and in use all the way up as you went up?

A. As I remember, they were taken out and moved from one pier to the other in many cases.

Q. In most cases, isn't it a fact that once you started a pier, they stayed in there until the pier was done? A. No, no.

Q. How often would you say that any of the so-called elephant trunks were taken from Pier 4 to any other pier?

(Testimony of Lester Earl Stevens.)

A. Pier 4 was one of the last piers poured, and that was practically a continuous pour.

Q. And was the biggest pier there, too, wasn't it?

A. Yes, sir.

Q. This picture is a picture of Pier 4, isn't it?

A. Yes.

Q. Do you have any recollection of the elephant trunks or the track ever having been taken out of Pier 4 to any other pier?

A. Not on pier 4. As I said, it was the last pier that was being poured, the only pier they were pouring on. No reason to take it out.

Q. I believe you have heard the previous testimony showing the total tonnage as something in excess of 5000 tons of reinforcing steel that went into the entire job.

A. Yes, sir.

Q. Can you tell me what proportion of what went into Piers 3 and 4 alone?

A. Between 3500 and 4000 tons.

Q. As a matter of fact, not only were they the biggest piers—when I say the biggest piers I refer to the height from top to base—but they had the greatest amount of steel as far as the number of rows in the base also, didn't they?

A. Yes, sir.

Q. Isn't it a fact also that in the base of most of those piers the concrete was poured only five feet at a time, and as you got higher up the greatest pour was only 10 feet at a time, the pour of the concrete?

A. Yes, I think when we got up near the top the pour was greater than 10 feet.

(Testimony of Lester Earl Stevens.)

Q. On which pier?

A. On 3—I wasn't there when the last of the pour was made.

Q. Were you ever there when a pour of more than ten feet at a time was made?

A. I wouldn't swear to that. I know on some of the piers the Union Paving Company poured more—I think 20 or 23 feet.

Q. What pier would that be on which 20 feet at a time was poured? [252]

A. Pier 2 was a very high pour that we made.

Q. In other words, that is one of the piers on the south side of the river?

A. Yes, sir.

Q. Have you in mind similar pours in any other pier?

A. No.

Q. But you have in mind they poured 20 feet at a time in Pier 2 starting at what elevation?

A. That was near the top. It may have been the last pour.

Q. Leave out that last pour, there, on Pier 2. Do you know of any time that they poured more than 10 feet at a time?

A. No, I couldn't say as to that. We would have to check the log on the pours to get what the piers were.

Q. A government inspector was on the job all the time, wasn't he, to see how much they poured?

Mr. Moore: I am going to object to that question, your Honor. I do not see the point in all this examination.

Mr. Wrigley: The point is this: If we could

(Testimony of Lester Earl Stevens.)

only pour concrete 5 to 10 feet at a time, there was no necessity for us to build a falsework 60 to 100 feet in the air.

The Court: Is the log here of the pours?

Mr. Wrigley: Mr. Dowling says it is.

The Court: Then why waste time?

Mr. Wrigley: Only to see the recollection of this witness under 43, which gives us the right of cross-examination.

The Court: If you want to know the pours, the log is here. It is not challenged by anyone. It speaks for itself.

Mr. Wrigley: Q. Referring again to Defendants' Exhibit A, Pier 4, and referring to the elevation 863 feet, weren't the pours only shallow at that point?

A. I don't know what the pours were, what the elevation between the break in the pours was at this particular place. [253]

Q. In Piers 3 and 4, picking those out, which you figure as being 3500 to 4000 tons, which can be assumed as an estimate——

Mr. Moore: Is that tons?

Mr. Wrigley: Tons.

Q. That steel extended in the air at times above the concrete 60 to 100 feet, didn't it?

A. I wouldn't say to 100 feet, no. I am satisfied it was never over 80 feet.

Q. What are the lengths of the steel bars there?

A. 60 feet was the maximum length.

(Testimony of Lester Earl Stevens.)

Q. Wasn't it the practice on Pier 4 to start placing the reinforcing steel just as fast as the welding 60 feet below was done?

A. Just as soon as we could get in on it.

Q. And two times 60 to 120, isn't it?

A. There was never two 60's above the pour.

Q. As fast as they welded a 60-foot bar, you immediately erected, or shortly thereafter, another 60-foot bar above that?

A. Never two 60-foot bars above the concrete, to my knowledge.

Q. Taking approximately half way up as being an average on Pier No. 4, there were two rows of 2-inch reinforcing bars, weren't there?

A. On Pier 4?

Q. On Pier 4.

A. I think we had three rows going all the way to the top on Pier 4.

Q. Are you sure of that?

A. Well, I would have to look at the plans before I would change my statement.

Q. It is your recollection there were three rows clear to the top of two-inch bars on Pier 4?

A. On two sides.

Q. Two sides? A. Two sides fo the pier.

Q. Which sides do you refer to?

A. The north and south sides.

Q. Which do you call the north and south sides—the sides adjoining the river and away from the river?

A. Yes. [254]

(Testimony of Lester Earl Stevens.)

Q. In other words, the two wide sides?

A. Yes.

Q. And taking two rows on two sides, then, and three rows on two sides made a total tonnage at a given elevation, if they were 60-foot bars, of how much?

A. How much for a 60-foot lift, do you mean?

Q. Yes.

A. I would have to figure that out, because I do not know the number of bars that was in there.

Q. Each one of those bars, if they were 60 feet long, weighed 900 pounds, didn't they?

A. If I remember right, it was 810 pounds.

Q. 810 pounds for a 50 or a 60?

A. 60. It may have been 910. I wouldn't swear to that without figuring.

Q. You cannot say the total weight of a complete circle of reinforcing steel half way up on Pier 4, then?

A. No, not without figuring.

Q. Did you ever figure it?

A. Not at that elevation. Around the base of the piers, I think we have some figures on that.

Q. Did you ever figure the stress on those bars that had to be supported by something to hold them up?

A. No.

Q. They would not hold themselves up, would they?

A. No.

Q. Now, there has been reference to the Chicago boom. The Chicago boom was the property of the Soule Steel Company?

A. Yes, sir.

(Testimony of Lester Earl Stevens.)

Q. And its primary function or purpose there was to use in raising the steel bars?

A. No, I wouldn't say that, because we used it eight hours a day, and Union Paving used it sixteen in the majority of cases. When they were not pouring concrete, they were using it continually.

Q. What were they using it for?

A. Hoisting of their forms, equipment, tools, placing of their forms and stripping them.

Q. Referring again to Defendants' Exhibit B—it only shows a [255] part of it—this is the Chicago boom in question, isn't it?

A. Yes, sir.

Q. In other words, it would be attached to the lift tower built by Union Paving Company?

A. Yes.

Q. You went upwards, and as you went upwards with the steel, the boom had to be raised, didn't it?

A. Yes.

Q. And very often the men of the Union Paving Company requested to and did raise it, didn't they?

A. Yes, sir.

Q. And it was their men, usually, and not the Soule Steel Company, that would raise that boom?

A. Yes.

Q. You do not remember coming to San Francisco on October 25, 1940, and then phoning Mr. Klein the next day, October 26, 1940, not to install any more falsework?

A. I would have to check the dates on that, but I know there was a telephone call in connection with that.

(Testimony of Lester Earl Stevens.)

Q. Was it necessary at any time to have a platform to pour concrete very much higher than the top of the concrete as being poured?

A. It was more economical, because you didn't have to put in a platform for every pour.

Q. It is more economical to build a 60-foot platform or an 80-foot platform than it is a 10- or 12-foot platform?

A. I didn't understand your question the first time, then. When your falsework is in you do not have to put a platform on every elevation.

Q. Assuming there was no falsework in there, at all, that Soule Steel Company had some other means of supporting that steel, would it be cheaper for Union Paving Company to build a 60- or an 80-foot interior falsework platform to pour concrete, or would it be cheaper to build an 8-, 10-, or 12-foot platform?

A. I never figured that, but I imagine it would be cheaper with some other type of construction. I don't know. [256]

Q. If you were only building a platform to pour five feet to ten feet at a time, you do not have to put in the heavy structural uprights, would you, that you do for a higher pour, when you are going to build a high falsework?

A. No, I do not imagine I would.

Q. You would not have to do the bracing there if you were only up there eight, ten, or twelve feet, that you would have if you were up sixty or a hundred feet, or fifty feet?

(Testimony of Lester Earl Stevens.)

A. Soule Steel did the bracing to support the steel.

Q. Showing you Defendants' Exhibit B, and calling your attention to the anchor bracing, was that put in by Soule Steel, or by Union Paving Company?

A. That was put in by Union Paving Company.

Q. What piers do you refer to as having been put in on the platform by——

A. Do you see (indicating)? These angle braces coming down here, one here, one here—you have those all through your piers running various ways, which were put in by the Soule Steel Company.

Q. If you were only using a platform 8, 10, or 12 feet high, would you have a necessity for these angle braces 2 by 6 to hold those?

A. The angle braces?

Q. 2 by 6 angle braces, as here.

A. They would have to be braced; wouldn't stand up there long.

Q. The same size and type of braces to hold a five- or ten-foot platform——

Mr. Moore: I think the question is argumentative, your Honor. I object to it.

Mr. Wrigley: (Continuing) ——that you would have for a 60-or 80-foot platform?

A. You have to continue the bracing as you go up. [257]

Q. The same size, irrespective of the height. That is all from this witness.

(Testimony of Lester Earl Stevens.)

Cross-Examination

Mr. Moore: Q. Mr. Stevens, you went on the job in January, 1940, I believe, and stayed practically continuously until February, 1941, is that correct? A. Yes, sir.

Q. When was the first request ever conveyed to you by a representative of the Soule Steel Company to put up any falsework?

A. Around the 25th of October, 1940.

Q. Up to that time had anybody, any representative of the Union Paving Company, ever made a demand or request that you put up the falsework in any of those piers for the interior?

A. On October 18th, Mr. Dowling said, "You can put up the falsework, yourself." That was the first——

Q. That was the first time?

A. That was the first time.

Q. Was there an accident there on the job; a man killed? A. Yes, sir.

Q. And that was on what date, do you remember? A. October 15th.

Q. And how was he killed, just in a very general way?

A. Well, the boom the man was on top of turned over, throwing the man down into the base of the pier, on the outside.

Q. Who was handling the boom at the time?

A. The Union Paving Company.

(Testimony of Lester Earl Stevens.)

Q. After that occurred, did you have any conversations with Mr. Morissette or Mr. Dowling?

A. I talked to Mr. Morissette just after the accident.

Q. What was said, if anything?

A. Well, there was a question about the accident. Nothing in particular—more describing it was too bad the accident happened.

Q. Subsequent to that time, did you have a conversation with Mr. [258] Dowling and Mr. Morissette?

A. On the 18th Mr. Dowling came up——

Q. What is that?

A. On the 18th of October Mr. Dowling was on the job, and we went up over the pier and discussed the conditions.

Q. What was said at that time?

A. Well, there was a discrepancy there on moving the derrick, why it was being moved, and the question came up about the falsework. Mr. Dowling said, “You can place your own falsework. You can go ahead and place the falsework.” And he took the stand that I would not be allowed to move any of the timbers that he had placed in that falsework, that we were not going to move any of his forms or supports.

Q. What did you do after he notified you at that time?

A. I put the derrick back up where it was and set the steel.

(Testimony of Lester Earl Stevens.)

Q. Did you communicate with the home office of Soule at that time? A. Yes, sir.

Q. Subsequently to that did you have any further conversations with Mr. Dowling or Mr. Morissette in regard to this matter—I mean the falsework?

A. I imagine we had—yes, we did have conversations on it afterwards. The question came up very frequently.

Q. Up on the job? A. On the job.

Q. Do you remember any particular conversation that was had there?

A. No, nothing in particular.

Q. I will put it this way, then—perhaps it is slightly leading—were any complaints made that the Soule Steel Company was not proceeding with diligence?

A. We got a letter from Union Paving Company to proceed with the falsework, to proceed with the steel work on Pier 5. Just the date of that I don't remember.

Q. I hand you a letter, or a copy of a letter dated October 28th, [259] Defendants' Exhibit GG, and ask you if that is the communication that you have reference to. A. Yes.

Q. Did you have at one time any men working on that falsework, at all, the framework?

A. On October 25th we may have had some men on that falsework. I think there was one or two men who went up there on the same work on that day.

(Testimony of Lester Earl Stevens.)

Q. Where was Mr. Soule at the time?

A. Mr. Soule was in Washington, D. C.

Q. You were communicating with his office, here? A. Yes, sir.

Q. That was countermanded, was it? Any men that were put on that were stopped immediately, weren't they? A. Yes, sir.

Q. I call your attention to a letter—I do not know whether this witness has identified it—I will hand you a letter. I don't know whether you have seen it. I will ask you whether you saw that at or about the time, or a copy of it?

A. I do not recall the letter. That possibly did not come to the general office.

Mr. Moore: We will offer this, your Honor, by stipulation with counsel, a letter dated October 28, 1940, addressed by the Union Paving Company.

(The document was thereupon received in evidence and marked "Plaintiff's Exhibit 24," and was read by Mr. Moore.)

Mr. Moore: I believe the letters introduced yesterday by Mr. Wrigley follow this up, bringing it to a conclusion.

Q. You were asked about carpenters, carpenters working on some place. If the Union Paving Company carpenters were used, were they paid for by the Soule Steel Company, do you know?

A. Yes, sir.

Mr. Moore: I think that is all at this time, your Honor. [260]

(Testimony of Lester Earl Stevens.)

Redirect Examination

Mr. Wrigley: Q. Now, you say the carpenters were paid by Soule Steel Company. On whose payroll were they?

A. They were carried on Soule's payroll, and if they were not put on Soule's payroll there was an accurate check made with the foreman as to the amount of time they worked on the templates.

Q. Isn't it a fact that whenever the carpenters of the Union Paving Company did any work, that they were still carried on the Union Paving Company's payroll and Union Paving Company would bill the Soule Steel Company for that? A. No, sir.

Q. Coming down to Pier No. 4, which was, we will say, the last in point of time, was any template at any elevation ever set on Pier 4 by Soule Steel Company, to your knowledge? A. Yes.

Q. At what elevation?

A. At the lower elevations while I was there.

Q. Set by what men?

A. In some instances we used Union Paving carpenters, and our men were always working with them, lining them up.

Q. You set the lower portions when you were there? A. Yes.

Q. To what elevations do you refer?

A. We were one lift above the portion where the pier straightens up when I left.

Q. What date would that be, approximately?

(Testimony of Lester Earl Stevens.)

A. February 15th, approximately February 15th, 1941.

Q. We will go back, we will say, to January 10th. Would it be earlier than that, possibly?

A. I would say it would be in that neighborhood.

Q. Before or after that?

A. Possibly before.

Q. How much before?

A. Well, we started that pier late in the fall, 1940—September—along in there, sometime.

Q. Mr. Stevens, will you check your records during the noon hour [261] and produce them this afternoon, showing where you employed any men on Pier 4 at any elevation and paid them to set what we refer to as the templates? A. Yes, sir.

The Court: Is that all from this witness?

Mr. Wrigley: No, your Honor.

Q. Do you know Ted Balliet on that job?

A. Yes, I think that is his name, his last name.

I knew him by Ted.

Q. He was the carpenter foreman?

A. Yes.

Q. You saw him quite continuously there, didn't you? A. Yes.

Q. Now, you said there was no request prior to October 18, 1941, with reference to the erection of any of this interior falsework. Wasn't that subject first brought up between you and Mr. Hunt—no agreement, discussion, or anything else—but the question as to who should install it, and you said

(Testimony of Lester Earl Stevens.)

that you would have to take it up with the San Francisco office? A. No, I do not recall that.

Q. Isn't it a fact that Mr. Dowling, in July, 1940, discussed with you the fact that under the contract, above the base, Soule Steel Company was to erect the interior falsework and/or pay for it?

A. No.

Q. And isn't it a fact that in September, 1940, Mr. Dowling again took that up with you and told you very definitely that he would not pay you any more money until some agreement was reached as to a proper division of the cost of that interior falsework? A. No.

Q. And isn't it a fact that just prior to that you took this whole matter up with Ted Balliet, the carpenter foreman, for the Union Paving Company, as to how the cost of that falsework should be divided, and he told you that in his opinion it should be divided 50/50? A. No. [262]

Q. Did you have any conversation with Mr. Ted Balliet at any time with reference to the division of the cost of that interior falsework? A. No.

Q. Did you ever have any discussion, at all, with Ted Balliet, with reference to the falsework?

A. Possibly talked about the falsework, yes.

Q. Approximately what dates did you discuss it with him? A. I wouldn't recall.

Q. Isn't it a fact that Ted Balliet was a carpenter foreman on that job during the entire time that you were there?

A. A good portion of that time. I don't remem-

(Testimony of Lester Earl Stevens.)

ber whether he was there when I first came on the job, or not. He may have been.

Q. Isn't it a fact that on numerous occasions, and on practically all of the piers, you and Ted Balliet discussed what interior reinforcing was necessary before you would go ahead and place the steel? A. No, sir, no.

Q. Didn't you also discuss with Ted Balliet the matter of the cross-bracing at the different elevations, that there should be more or less than there was there? A. No.

Q. You never discussed that subject with Ted at all?

A. Any additional bracing we placed ourselves.

Q. And you never, so far as you can recall, pointed out to him what was necessary and how he should do it? A. No.

Q. Was there any other carpenter foreman there besides Ted Balliet at any time that you were there?

A. A man by the name of Mr. Scott—or Mr. Black—Mr. Black was on Pier 4.

Q. What position did he occupy?

A. He was carpenter foreman.

Mr. Wrigley: That is all.

The Court: Step down. [263]

L. H. MORISETTE,

called as a witness on behalf of defendants; sworn.

The Clerk: Q. Will you state your name?

A. H. L. Morisette.

Direct Examination

Mr. Wrigley: Q. What is your business, Mr. Morisette? A. Construction worker.

Q. And you have been such for how long?

A. About ten years, Union Paving Company.

Q. Ten years with the Union Paving Company?

A. Yes.

Q. Prior to that——

A. I worked for the Southern Pacific Railroad.

Q. Coming specifically to the so-called Pit River pier job and abutments, when did you go to work on that job? A. I didn't hear the question.

Q. I said, coming specifically to the Pit River and abutment job, when did you go to work there?

A. The latter part of June, I think, or sometime possibly the middle of June, 1940.

Q. And you were there how long?

A. Until June, 1941.

Q. When you first went there in June of 1940, what did your duties consist of? What were you doing?

A. I went up there first to assist Mr. Cochrane, who was the superintendent there at that time.

Q. And later?

A. Later I was superintendent.

Q. Starting approximately when?

(Testimony of L. H. Morisette.)

A. Well, the latter part of July, I think.

Q. Of 1940? A. 1940.

Q. You, of course, knew Mr. Stevens on that job? A. Yes, sir.

Q. And what position did he occupy or appear to occupy?

A. Mr. Stevens was superintendent for the steel, the reinforcement steel. [264]

Q. That is the placing of the reinforcement steel?

A. The placing of the reinforcement steel.

Q. Was there any other representative of the Soule Steel Company regularly on the job over him?

A. Not that I know of, no.

Q. In other words, so far as you knew or understood, he was the head man there for Soule Steel Company? A. That is right.

Q. After you came on the job, did you have any discussions with Mr. Stevens with reference to the placing of reinforcing steel?

A. Well, I had numerous discussions with Mr. Stevens relative to the placing of reinforcing steel, because that was his work.

Q. Approximately when was the first discussion that you had with him?

A. Relative to placing reinforcement steel?

Q. Yes.

A. I couldn't tell you, probably as soon as I got there.

Q. Anything particular about that discussion that impressed itself upon your mind?

(Testimony of L. H. Morisette.)

A. No.

Q. Or just a general discussion?

A. Just general discussions about locations of placing steel, the possibilities of where we would be pouring next, or where we would want his services next.

Q. Did you ever have any discussions with Mr. Stevens with reference to delay in placing reinforcing steel?

A. Numerous discussions.

Q. Starting when?

A. I would say in July, August—right along in there.

Q. Give us the substance of what you said and what his reply was.

A. Well, I don't recall word for word, but my complaint was, as far as delay in placing reinforcement steel, that he was not doing it fast enough, or using crews, or working enough shifts to place it in time for us to keep a continuous operation going and coordinate our operations.

Q. And what reply would he make?

A. Generally he would state that [265] he was doing the best he could, which I think he was, possibly, with the crews at hand.

Q. You say with the crews in hand.

A. With the crews that he had.

Q. During that period—we will say July, August and September, 1940—what size crews did they have there erecting the reinforcing steel?

A. I think that generally he worked two shifts—

(Testimony of L. H. Morisette.)

I mean one shift, and that he had either two or three crews—I am not sure—and that the crews would vary; under a foreman they would probably vary from six to eight, although many times only two or three men would be working in one place.

Q. Did you have any discussion with Mr. Stevens with reference to the placing of the interior falsework or framework there?

A. I was present at discussions where that subject was brought up.

Q. Who else was present at the first discussion on that subject that you have in mind?

A. Mr. Dowling, Mr. Stevens.

Q. Where did that discussion take place?

A. Where?

Q. Yes. A. On the job.

Q. About what date?

A. I couldn't remember the dates.

Q. Approximately.

A. I would say in July, sometime, the latter part of July, possibly, or the middle of July.

Q. Of what year? A. 1940.

Q. Give us the substance of that conversation, what each said, as you remember it.

A. Well, my recollection is that the first discussion was about in July. It took place near the shop, which was located between Piers 2 and 3, and that Mr. Dowling told Mr. Stevens, "It is about time we should determine [266] some proportion of responsibility in reference to the interior scaffolding or bracing for the falsework."

(Testimony of L. H. Morisette.)

Q. That is what Mr. Dowling said. What reply did Mr. Stevens make, if any?

A. Mr. Stevens said he would have to take it up with San Francisco.

Q. When was the next conversation that you have in mind, approximately?

A. My next—the next one—my next recollection of that is early in September. I am not sure just exactly the time.

Q. Where did that conversation take place?

A. I think it took place in front of a little warehouse or tool shed that Mr. Stevens had there near our office on the job.

Q. And who was present?

A. Again Mr. Dowling and Mr. Stevens.

Q. Just what was said at that time, as you remember it?

A. Mr. Dowling pressed again for some decision or some method of distributing the cost of the falsework, the interior falsework.

Q. What reply was made, if any?

A. Well, as I recall, there was no definite—Mr. Stevens was evasive.

Mr. Moore: I ask that that go out.

The Court: It may go out. State what he said, as near as you remember.

A. I don't remember what Mr. Stevens said, except nothing definite.

Mr. Wrigley: Q. Were there any later conversations on that subject in your presence?

(Testimony of L. H. Morisette.)

A. Yes, sir.

Q. Approximately what date?

A. I would say in October, the latter part of October.

Q. Where did they take place?

A. I think they were on the job, on the north side of the river; I am not sure.

Q. Who was present, as you remember it?

A. Again Mr. Stevens and Mr. Dowling, and possibly Mr. Hunt, but I am not sure. [267]

Q. Give us the substance of what each person said at that time, as you remember it?

A. Well, my recollection is that Mr. Dowling again told—brought the matter up and told Mr. Stevens that he would not set any more reinforcement interior supports or falsework, and that Mr. Stevens said he would take it over.

Q. Anything else that you remember said at that time? A. Any other conversation?

Q. No, I say was there anything other than that said at that conversation?

A. I don't recall—I don't recall in any detail.

Q. Following that conversation, did Soule Steel Company undertake to set the falsework?

A. Yes, sir.

Q. How long did they continue it?

A. They set falsework the next day, and that was the only day.

Q. Did you have any later conversation with any representative of Soule Steel Company on the matter of setting the falsework?

(Testimony of L. H. Morisette.)

A. I think Mr. Stevens left that night—I am not sure—in any event, Norman Klein, who was his foreman, and I think at that time possibly the only foreman that he had there, said the next day that Mr. Stevens had telephoned him to stop setting bracing or falsework.

Q. Did you have any later discussion on that subject? A. I think in the spring of 1941.

Q. I didn't get that last answer.

A. In the spring of 1941.

Q. Where did that conference take place?

A. That was in reference to Pier 4, and I think it took place in the vicinity of Pier 4, some place.

Q. Who were present?

A. I think Mr. Klein, I'm not sure about Mr. Stevens, and I think Mr. Dowling also.

Q. What was said at that time?

A. We requested that they build [268] the interior falsework and bracing to support the steel.

Q. What reply was made?

A. I think they refused to.

Q. And with the exception of this one date in the latter part of October, they did not at any time set interior framework or falsework on which to recline the steel? A. No, sir.

Mr. Wrigley: That is all.

Cross-Examination

Mr. Moore: Q. This meeting that took place in October, that was shortly after that man was killed up there, was it not?

(Testimony of L. H. Morisette.)

A. Well, I think it was after that a few days.

Q. And Mr. Dowling was up there at the time?

A. Yes sir.

Q. Will you repeat just what Mr. Dowling said to Mr. Stevens at that time?

A. I can give you my recollection of that. I think that he told Mr. Stevens, "Hereafter we will not set any more falsework for the steel."

Q. Is that all he said?

A. Yes. Undoubtedly, there was other conversation; I do not recall what it was about, particularly.

Q. That is the only thing you recall?

A. That is the thing that stands out in my mind.

Q. Did Mr. Dowling say, "If you do not set it, we are going to sue you and throw you off the job"?

A. No.

Q. He did not say that? A. No.

Q. You are sure?

A. I don't recall it. I didn't hear it.

Q. What did Stevens say, that he would set it, or he wouldn't set it?

A. He said he would call San Francisco and find out.

Q. Did he say anything about Mr. Soule being in Washington, D. C.? A. No.

Q. He did not say anything about that?

A. No, not about being in Washington. I am aware of the fact that Mr. Soule was [269] in Washington. I don't know when or where.

(Testimony of L. H. Morisette.)

Q. You do not remember Stevens saying at that time, "Well, Mr. Soule, who is in charge of this, is in Washington, D. C. at present and can't be reached; the difficulty in reaching him except by telephone or telegraph"?

A. I do not recall that definitely, no.

Q. Would you say that he didn't say that?

A. I wouldn't say that he didn't.

Q. When was this first conversation that you listened to between Mr. Dowling and Mr. Stevens?

A. I didn't hear the question.

Q. When did you say the first conversation took place?

A. I would say it was in July, possibly the middle of July.

Q. Possibly the middle of July?

A. Maybe before, but in July sometime.

Q. Were you superintendent at that time?

A. Well, you might say I was acting superintendent.

Q. Wasn't Mr. Cochrane on the job?

A. I don't think he was there at the moment. Mr. Cochrane was sick.

Q. And you were with Mr. Dowling.

A. Yes.

Q. And did he hunt up Mr. Stevens?

A. I don't remember whether he hunted him or whether we ran into him, or whether he ran into us. I know that we met and we were in a group.

(Testimony of L. H. Morisette.)

Q. Just what did Mr. Dowling say to Mr. Stevens on that occasion?

A. My recollection is that he told him it was about time that we should devise or determine some method of proportioning the cost of the interior falsework.

Q. Proportioning the cost of the interior falsework, is that it?

A. Yes, handling it in some way.

Q. He did not say anything to the effect, "It is your duty under the contract to put it in," did he?

A. The impression I [270] got was——

Q. I am asking you what he said. Did he say anything of that kind?

A. I don't recall the exact conversation.

Q. But he talked about apportioning the cost at that time, did he? A. Yes, sir.

Q. Did he suggest how it should be apportioned?

A. No. He said it was about time that they arrived at some method of apportioning it.

Q. And Stevens said he would take it up with the San Francisco office? A. Yes.

Q. Didn't he ask Mr. Dowling why he didn't take it up with Mr. Soule?

A. I don't recall that he did.

Q. Didn't he say, "I am only the superintendent on the job. Why don't you take it up with him?" A. I don't think he did.

Q. Did Mr. Dowling say he had taken it up with Mr. Soule and couldn't get any satisfaction out of him? A. No.

(Testimony of L. H. Morisette.)

Q. Never suggested that he had ever discussed the matter with Mr. Soule? A. No.

Q. But he talked to those men and said, "Now, you and I want to talk about how to divide and apportion this cost." Is that what he said in effect?

A. He said it was about time that we should arrive at some thod of apportioning the cost.

Q. Didn't Stevens ask him why he took it up with him rather than taking it up with Mr. Soule?

A. No.

Q. And you say that Stevens said he would take it up with the San Francisco office?

A. Yes, sir.

Q. Then the same thing occurred two months later, is that correct?

A. Approximately two months.

Q. Did Mr. Dowling say at that time,—will you repeat again what he said at that time, that Mr. Dowling said to Stevens? [271]

A. The first time?

Q. No, the second time, in September.

A. I don't recall the exact words. I think I said a little while ago I did not, but I think the subject was the same subject that was brought up with the same result, that we go no place on it.

Q. That they wanted to get an arrangement to apportion the cost, is that right?

A. An arrangement to take care of the false-work, who should do it, how to pay for it, and so forth.

(Testimony of L. H. Morisette.)

Q. What did Stevens say, he had taken it up with San Francisco, or was?

A. I do not recall.

Q. You do not remember what Mr. Stevens said?
A. No.

Q. Do you remember Dowling saying to Stevens, "It has been two months now and you haven't taken it up with your San Francisco office"?

A. N.

Q. Did Mr. Dowling say to Mr. Stevens, "Well, I have taken this up with the San Francisco office"?

A. No.

Q. At this September meeting did Mr. Dowling threaten Stevens that if he did not take care of the falsework, or apportion it, or agree to some apportionment with him, that he was not going to pay him any more money?

A. I do not think he said anything about that. I am not sure.

Q. But in October, why—that was after a man had been hurt—there was a very definite conversation?
A. Yes.

Q. Did he ask him then why he had not taken it up with the San Francisco office?

A. I do not recall that he did.

Q. Did Mr. Dowling suggest to Mr. Stevens in any way that he had tried to take this matter up with the San Francisco office, or Mr. Soule and had met with no success?

A. I do not recall that.

(Testimony of L. H. Morisette.)

Q. All he did at this October meeting, he told Mr. Stevens— [272] Will you say again just what Mr. Dowling told him?

A. My recollection is that he told Mr. Stevens that we would set no further false work for the reinforcement steel.

Q. You were the superintendent. Did he give you instructions to stop work then?

A. Yes, sir.

Q. And you refused to set any more or do any more work?

A. Yes, sir.

Q. At that time?

A. At that time.

Q. Were you conferred with with regard to this letter that Mr. Hunt wrote to Stevens to the effect that they were not proceeding with their work? Were you consulted in regard to that?

A. I think I saw the letter. I am not sure. I would have to see the letter to know.

Q. Calling your attention to a letter signed by Mr. Hunt, have you seen that before?

A. Yes, sir, I recall that letter.

Q. Were you there when it was signed?

A. I think so.

Q. As a matter of fact, didn't Mr. Dowling dictate that and Mr. Hunt seen it?

A. I couldn't tell you.

Q. Don't you remember?

A. I don't know. I think Mr. Hunt wrote it, though.

Q. You do not know under what instructions

(Testimony of L. H. Morisette.)

he wrote it, do you? You did not give them to him, did you? You were superintendent on the job.

A. I told him we were stopped there without the reinforcement steel.

Q. When you went up there and replaced Mr. Cochrane, didn't you have discussions with Mr. Dowling and complaint about lack of diligence of the Soule Steel Company?

A. No, sir, definitely not.

Q. But you were complaining about the lack of diligence, isn't that true?

A. Not at the start. [273]

Q. When did you start to?

A. I would say sometime early in July.

Q. You also complained about the lack of diligence of the Welding Company, did you not?

A. That is right.

Q. They quit the job, did they not?

A. They did.

Q. And you complained about their lack of diligence, did you not, in welding? A. To whom?

Q. To them. Didn't you write them letters, or didn't you complain to their foreman that they were not proceeding with the welding?

A. At times, possibly.

Q. As a matter of fact, they had a man who was doing the excavating. Did you complain to him, too? Were you there when he was on the job? A. Who is that?

Q. The one who started the excavation there, because his money was withheld; were you there

(Testimony of L. H. Morisette.)

when his money was withheld and he had to quit the job? A. No.

Q. But you did give notice to this Welding Company that they were not diligent in prosecuting their work, didn't you?

A. I do not recall any notice.

Q. I mean to their foreman.

A. I think I complained that they were not diligent. I don't know whether it was their fault, or not. They had labor difficulties.

Q. And you were complaining about Soule's lack of diligence?

A. I did complain about Soule's lack of diligence, not competence.

Mr. Moore That is all of this witness.

Mr. Wrigley: If the Court will just bear with me a minute on this witness.

The Court: Very well.

Redirect Examination

Mr. Wrigley: Q. Isn't it a fact that when you went there in [274] June of 1940 everything on the job was way behind schedule so far as the Government was concerned?

A. That is a fact.

Q. And you were trying to catch up?

A. That is right.

Q. And you were complaining continuously about everybody being slow, isn't that the fact?

A. The job was running twenty-four hours a day, and we were trying to utilize every means to speed up and catch up, particularly with the ex-

(Testimony of L. H. Morisette.)

cavation, the carpenter work, and to have some place to pour concrete, and after we started to pour concrete, to pour it continuously.

Q. And almost continuously from the time you went there until you got through you were behind Government schedule, weren't you?

A. That is right.

Q. On each and every pier and abutment, with few exception?

A. On all schedules, I think, except one.

Mr. Wrigley: That is all.

Mr. Moore: No questions.

The Court: We will take an adjournment until 2:00 o'clock.

(A recess was here taken until 2:00 o'clock p. m.) [275]

Afternoon Session — April 16, 1943 —
2:00 o'Clock P. M.

LESTER EARL STEVENS,

recalled.

Redirect Examination (resumed)

Mr. Wrigley: Q. Mr. Stevens, during the noon hour you were to look at the plans and tell us, first, how many steel bars there were in two concentric circles around that Pier 4 half way to the top. A. Half way to the top?

Q. Yes.

A. You will have to excuse me on that. I didn't look that up.

(Testimony of Lester Earl Stevens)

Q. Can't you just look at one of these drawings of Pier 4? A. Yes, we can.

The Court: Do you know, Counsel, what it is, yourself?

Mr. Wrigley: No, your Honor, only hearsay from their man, Mr. Klein, and I wouldn't even attempt to figure it.

Mr. Moore: There doesn't seem to be any map or Government plan, or any diagram of the reinforcing steel on Pier 4.

Q. Is that correct?

A. That is correct. There was more steel in Pier 4 than there was in 3.

Mr. Wrigley: Q. Pier 4 was, from the standpoint of steel and from the standpoint of concrete, the big pier, wasn't it? A. Yes.

Q. And is even considerably larger in size and deeper in the ground than Pier 3, which is on the south side of the river?

A. Well, no, there wasn't much difference. I think there was only 6 to 12 inches difference in the height of the two piers.

Q. Didn't Pier 4 have a larger base than Pier 3?

A. It may have been five feet wider one way.

Q. And it also went slightly deeper in the ground, didn't it?

A. Yes, one corner we had to carry down in the pier. [276]

Q. Considerably lower than 3? A. Yes.

Q. In fact, Pier 4 and Pier 2 were not constructed in accordance with the original design

(Testimony of Lester Earl Stevens)

in that particular; they were excavated deeper in order to get footing, weren't they?

A. I don't remember on Pier 2 whether it was, or not.

The Court: Whether it did or not does not enter into the merits of this case.

Mr. Wrigley: Only into the question of the variation of the amount of steel.

Q. Now, with reference to the false work, including the templates and the spacers on all the piers, 1 to 7, inclusive, wasn't all that lumber bought and paid for by Union Paving Company?

A. Yes, sir.

Q. Did Soule Steel Company ever reimburse Union Paving Company for any of that lumber?

A. Not to my knowledge. I don't think we ever received any bill for it.

Q. And you never paid for any of it, either, did you, to your knowledge? A. No.

Q. Now, you left there, as I remember, according to your testimony, April of 1941, is that correct?

A. February.

Q. Pardon me. I think I made a misstatement. You are correct. You said February 18, 1941. My statement of April was not correct. At that time Pier 4 was started and what we might call the base was then complete, was it not? A. Yes.

Q. They were just about starting up on the next portions of it at the time you left?

A. They had part of that concrete poured. There

(Testimony of Lester Earl Stevens)
was one lift of steel already placed above the pyramid section.

Q. Did you examine your records and find where you paid for any carpenter labor for erecting spacers or templates above the [277] base of Pier 4?

A. Above the base?

Q. Yes.

A. I have some time here. It is a copy of the time kept by Union Paving's foreman, which was turned over to the man who picked up the job after he left, Mr. Klein, in which he states here "Paid by Union Paving Company, accepted as chargeable to the Soule Steel Company."

Q. But was it paid by——

A. It was paid by the Union Paving Company.

Q. Was it ever repaid, to your knowledge, by the Soule Steel Company to Union Paving Company?

A. We have been billed for those billings. We have been billed for this labor.

Q. Have you ever received any billing for it outside of the general billing for labor for falsework, and so on?

A. I do not know as to this particular part of it, but we have billings on labor for placing templates.

Q. Was any of that ever paid, or just you received the billing for it throughout the entire job? I refer now to the carpenter labor employed by the Union Paving Company.

(Testimony of Lester Earl Stevens)

A. I O.K.'d these to allow for payment.

Q. But was it ever paid, to your knowledge?

A. I take it for granted that it was deducted from the billing. Now, I can't say as to that—deducted from the payment.

Q. Did you find any record where the Soule Steel Company on Pier 4 above the base ever paid any of these men direct for carpenter work, setting templates, or spacers?

A. I have to go into the Government reports in order to check that. The records I have now don't show it. It would take some time to locate them.

Q. Have you any personal recollection?

A. As it was, as I wasn't on the job after we left the base of the pier, I couldn't [278] say as to that.

Mr. Wrigley: That is all.

Mr. Moore: That is all.

Mr. Wrigley: Now, there are two phases of this case that I am just a little uncertain on the order of procedure at this time, both as to Mr. Soule and Mr. Stevens. We called them under Section 43. After that examination they were examined by their counsel, and we desire to put Mr. Dowling on to rebut certain of their testimony in rebuttal, and it would seem to me out of order at this time to present that rebuttal until they have completed their case.

Mr. Moore: We will proceed.

Mr. Wrigley: The other matter I am practically lost on. The carpenter foreman assured us he would be able to be here today, and he was to have been at my office at one o'clock, to take the stand at two this afternoon. That was the program. This morning he advised that he is engaged in the war work across the bay, and they will not release him, and he cannot appear here as a witness. Now, there are two procedures: One, we might say we could forget his testimony, or we could take it by deposition, or it may be that they will stipulate to the substance of what he would testify to.

The Court: There is nothing before the court at this time. Call your next witness.

LESTER EARL STEVENS,

recalled as a witness for plaintiff in rebuttal, having been previously sworn, testified as follows:

Mr. Moore: Q. Mr. Stevens, in connection with this Pit [279] River job, when did you first come to San Francisco?

A. I came to Mr. Soule's office on November 3, 1939.

Q. Your home is in Seattle, is it? A. Yes.

Q. How long did you remain here?

A. I was here until the 14th or 16th, in there somewheres.

(Testimony of Lester Earl Stevens)

Q. During that period of time did you make various estimates with relation to the cost of placing the reinforcement steel, working in collaboration with Mr. Soule? A. Yes.

Mr. Wrigley: I want to object to this as incompetent, irrelevant, and immaterial, attempting to vary the terms of a written contract.

The Court: The objection is overruled.

A. Yes, we did.

Mr. Moore: Q. Did those estimates include supporting devices? A. They did at first.

Q. Or supporting members? A. Yes?

Q. When you left here where did you go?

A. I went over the job with Earl Holcomb, went over the job at Redding on the Pit River.

Q. Then where did you go?

A. I continued on to Seattle.

Q. Did you subsequently return to San Francisco?

A. I returned to Seattle on December 8th.

Q. To Seattle, or San Francisco?

A. To San Francisco. Pardon me.

Q. Did you at that time revise the former estimates that had been made, or assist in the collaboration of that? A. Yes, we did.

Q. And did those new estimates include or not include the re-inforcing members?

A. They did not.

Mr. Wrigley: Same objection to this entire line of examination. [280]

The Court: Read the question, Mr. Reporter.

(Testimony of Lester Earl Stevens)

(Question and answer read.)

The Court: The objection is overruled.

Mr. Wrigley: Will you stipulate, Counsel——

Mr. Moore: I will stipulate.

Mr. Wrigley (continuing): —that my objection runs to this entire line of examination, and I will in due course make a motion to strike out?

Mr. Moore: So stipulated.

Q. Mr. Stevens, did you return to San Francisco again? A. Yes.

Q. What date was that?

A. I came down by plane on December 28th.

Q. Arriving here when?

A. December 28th. I went to Mr. Soule's office on the 29th of December, 1940 — 1939.

Q. Whom did you meet there?

A. Mr. Cochran, and Mr. Dowling, and Mr. Soule.

Q. Was a conference had there at that time between the four of you? A. Yes.

Q. Where did that conference start? In what part of the building?

A. Well, we went to Mr. Soule's office first, and then we went upstairs into the engineering room.

Q. Who went upstairs?

A. Mr. Soule, and Mr. Dowling, and Mr. Cochran and myself.

Q. Had you ever met Mr. Dowling before, or was that your first meeting?

A. I don't remember if I met Mr. Dowling before, or not. I couldn't say as to that.

(Testimony of Lester Earl Stevens)

Q. You have no particular recollection of meeting him before? A. No.

Q. When you arrived up in the engineering room, what occurred up there?

A. We had gone over plans, and was discussing [281] the reinforcing. The principal thing was the supports for reinforcement steel—the timber structure that was going to be used.

Q. What occurred then? What was done?

A. It was described by Mr. Dowling and Mr. Cochrane—principally Mr. Cochrane—the type of falsework that he was going to use, and which could be used by the Soule Steel Company free of charge for supporting their reinforcement steel.

Q. What was done there, anything at all—any more accurate description of the type of structure?

A. Well, we had this drawing that has been presented, and there was sketches drawn in just how the falsework would be erected.

Q. By this drawing, you refer to Plaintiff's Exhibit 22, is that correct? Will you look at it?

A. Yes, sir, this is the same drawing.

Q. And that was present in the drawing room when yourself, Mr. Dowling, Mr. Cochrane and Mr. Soule were present, is that correct?

A. Yes, sir.

Q. What was the condition of this drawing at the beginning of the conference?

A. May I have that question again?

(Question read.)

(Testimony of Lester Earl Stevens)

A. Well, it showed the reinforcing steel on the outside, which was put on in Los Angeles.

Q. What else did it show?

A. It may have showed some of the pours, the elevation of the pours at that time.

Q Did Mr. Cochrane and Mr. Dowling describe at that time the type of falsework or framework that they intended to use? A. Yes, they did.

Q. Will you tell us, as nearly as you can, what they said?

A. Well, they said they were going to place a timber structure [282] of 10 by 10 timbers, and that would be continued all the way up the piers. Now, this timber may not be to the proper size for the reinforcing steel, but it was to be of our account, Soule Steel Company, to build out any horizontal timbers or supports and place a template around it which the reinforcing steel could be laid against.

Q. Now, as this type of structure was described, what, if anything, did Mr. Soule or yourself do?

A, May I have that question again, please?

(Question read.)

A. We placed the templates in some instances; in some cases they were placed with the Union Paving contractor's—

Q. No, I do not mean that. I mean at this conference—I am not talking about the templates now—I mean at this conference, with this drawing before you, what, if anything, did you or Mr. Soule do as it was described to yourself and himself, as

(Testimony of Lester Earl Stevens)

to the type of structure they were going to put in there?

A. Well, it looked entirely satisfactory.

Q. What did Mr. Soule do while Mr. Cochrane described it to him?

A. Well, Mr. Soule drew in the falsework, the type that they informed him they were going to use.

Q. Did you see him draw it in?

A. Yes, I did.

Q. That was in the engineering room with this map before you?

A. In the engineering room of Mr. Soule, yes.

Q. It was described at that time by Mr. Dowling and Mr. Cochrane? A. Yes.

Q. And he drew it into the picture, did he?

A. Yes, sir.

Q. What happened after that portion of the conference, Mr. Stevens?

A. Well, we went downstairs, and Mr. Dowling and Mr. Cochrane—they left the office and went out for—no, we went [283] to dinner and came back, but after the discussion on the drawings we went down to the office, Mr. Soule and I, and Mr. Dowling and Mr. Cochrane went for a walk, and we went down and rechecked our figure.

Q. And then what happened?

A. We arrived at a lower figure, and they came back, and we finally started debating on the final price.

Q. What was said, and who said it, if you recollect?

A. Well, Mr. Dowling asked if we had our price

(Testimony of Lester Earl Stevens)

arranged, and Mr. Soule gave him a price, and it didn't seem to agree with the total——

Q. What was the price?

A. \$24 a ton, the price Mr. Soule gave to Mr. Dowling,

Q. And then what happened? Go on with the conversation, if you will. What occurred?

A. Mr. Dowling had a lower price in there of \$21 or \$22 a ton that he expected to place the steel for. We discussed the thing back and forth, and finally agreed—we came within a few dollars, or a few cents, you might say, a ton, and Mr. Cochrane and I—we were in the room present at the time—and we suggested that we split the figure, which brought it to \$22.50 a ton.

Q. I will hand you two documents here, Plaintiff's Exhibit 21 and Plaintiff's Exhibit 23, and the two letters that have inter-lineations in them, typewritten; have you seen those before?

A. Yes.

Q. Where did you see those?

A. Well, Mr. Soule had two copies in his office that day, the 29th of December, and there were some changes that we wanted in here that wasn't on the original typewritten section of it, and Mr. Soule wrote in with pencil the additional changes which we agreed on as the contract. [284]

Q. Were those changes in the typewritten portion discussed there at the time by anybody when Mr. Soule wrote them in? A. Yes.

Q. Who entered into that discussion?

(Testimony of Lester Earl Stevens)

A. I would say the four of us—Mr. Soule, Mr. Dowling, Mr. Cochrane, and myself. We all understood it very thoroughly.

Q. Can you recollect in regard to the seventh item, in which was written in pencil that you were to furnish wooden supporting framework—do you recollect what was said, if anything, as that change was made?

A. Well, that was the main discussion that day, that the falsework would be furnished, and the type of falsework that was going to be furnished by the Union Paving Company.

Q. As you say, that was blocked out upstairs prior to the meeting down there? A. Yes, sir.

Q. Do you know what happened to those two letters or papers at the conclusion of the meeting?

A. Well, I know Mr. Soule kept one, and I think one was given to Mr. Dowling.

Q. What is your recollection?

A. Mr. Dowling took one with him, and Mr. Soule kept one in his office.

Q. Was any conversation had at that time about preparing a contract?

A. Mr. Soule said he would write up the contract, have one of the office employees write up the contract. Mr. Dowling said no, he would take it home and have it made up in his office.

Q. And he left with one of those papers in his possession, did he? A. Yes.

Q. For the purpose of illustration, did you, in conjunction with Mr. Soule, prepare a diagram as

(Testimony of Lester Earl Stevens)

to the completeness of the various piers and abutments as of October 15th? A. Yes. [285]

Q. And on this there is placed a statement of account up to that date. From what did you prepare this, or cause this to be prepared? What records?

A. That was the portion that was complete at the time of the accident, and the man was killed on the boom.

Q. For instance, abutment No. 1 shows it was completed May 4, 1940. There was 112 tons of steel placed in it. From what source did you get those records?

A. The tonnage is the Government report, and the completion date was the last work we did on the steel.

Q. And you followed that same process for the balance of the piers and abutments? A. Yes.

Mr. Moore: I will offer this as an exhibit as an illustration to show the condition of the work at that time.

The Court: It may be admitted and marked.

(The document was thereupon admitted in evidence and marked Plaintiff's Exhibit 25.)

Mr. Moore: I think that is all.

Cross-Examination

Mr. Wrigley: Q. Mr. Stevens, can you tell us the date that you say this particular drawing came back from Los Angeles?

A. No, I could not. I was probably not in the office when it came in.

(Testimony of Lester Earl Stevens)

Q. Prior to the 29th day of December, there was a previous drawing, wasn't there, a rough sketch? A. Not that I saw.

Q. Not that you saw? A. No.

Q. How do you fix December 29th as the date that you say that you, Mr. Soule, representing your company, and Mr. Cochrane, and Mr. Dowling were down there and discussing the price and other phases of the work?

A. Our record show that I came to [286] Soule's office on the morning of the 29th. I came down by airplane, and it was my wishes to return for New Years. I was unable to get out on the plane, so I took the train and got back and arrived in Seattle in time for New Years.

Q. Now, didn't this conference that you referred to take place when you were here on the 17th day of December, 1939? A. No.

Q. Of November, I mean to say? A. No.

Q. Have you any record you made, yourself, showing the date of that conference?

A. This wasn't—it was on the 29th. That was the only time that we had that complete understanding.

Q. All right. We will go back to the 17th day of November, 1939. Didn't you and Mr. Soule and Mr. Dowling have a conference—and Mr. Cochrane—at Mr. Soule's plant on Army street on the 17th day of November?

A. No. On the 17th day of November I was in Dunsmuir, California, to the best of my knowledge.

(Testimony of Lester Earl Stevens)

Q. Wasn't that the date, also, that Mr. Dowling was discussing the matter of the price?

A. No.

Q. How many times have you seen that drafting room at Soule's office?

A. How many times have I saw the drafting room?

Q. Yes.

A. I have been in there many times.

Q. You have been in there many times, haven't you?

A. Yes.

Q. What size are those drafting tables?

A. The table we were using is, oh, possibly four by nine or ten feet.

Q. And the drawing that you had in front of you that day was put down on that drafting table, wasn't it?

A. Yes.

Q. And was the drawing as wide as this? Was that drafting table as wide as this drawing?

A. Yes.

Q. That drafting table was as wide as this drawing?

A. Yes, sir.

Q. What date do you fix as the discussion of the price of \$22.50?

A. December 29, 1939. [287]

Q. And these two writings were there at that time, December 29th?

A. Yes, they were.

Q. And the changes that are interlined here were made at that time?

A. Yes.

Q. And at that same time the price was discussed and agreed on, you say?

A. Yes.

Q. Showing you Plaintiffs Exhibit No. 21, I

(Testimony of Lester Earl Stevens)

ask you if you see anything in there about a \$22.50 price.

A. I don't see it on this one, but I know that was the price that we agreed on.

Q. This writing says \$24.80, doesn't it?

A. The typewriting does.

Q. Yes, and there is no change of that in any particular, is there?

A. The price that was agreed on that day——

Q. No, I am talking about this writing.

Mr. Moore: The writing speaks for itself, Mr. Wrigley.

Mr. Wrigley: Q. Now, was the matter of a job engineer discussed that day? A. Yes, it was.

Q. Did you see the written contract of January 6, 1940, before it was signed? A. No.

Q. As I understand your testimony, after these changes were made, Mr. Dowling left there with one of these copies? A. Yes, sir.

Q. Now, prior to this drawing did Soule Steel Company have any drawing showing the construction of supporting devices there?

A. We had made various sketches of different ways of supporting the steel.

Q. As a matter of fact, you had sketches other than this one there which provided for Soule Steel Company supporting that reinforcing steel?

A. Yes.

Q. And those were used in that discussion, weren't they?

A. The different types were discussed, I know.

(Testimony of Lester Earl Stevens)

There is one type of drawing drawn on that same drawing. [288]

Mr. Moore: What was that?

(Record read.)

Mr. Wrigley: Q. I will ask you to examine this particular drawing and show me the markings or writings on it with reference to holding up the reinforcing steel.

A. (Indicating): These are carried out to support the steel against.

Q. What elevation are you pointing to now?

The Court: Are you gentlemen having a good time there? I am expected to follow this.

The Witness: These timbers were drawn in (indicating).

Mr. Wrigley: Q. Those are cross timbers?

A. Yes. Here are the vertical timbers carrying it through here.

Q. Now, these are the ones that you say were put on where?

A. In Mr. Soule's office, in the engineering room.

Q. By whom? A. Mr. Soule.

Q. This first sketch that we have here, consisting of eight cross sections, represents what height?

A. To the top, here?

Q. Yes.

A. This is approximately 90 feet above the base of the pier, as I remember it.

Q. Now, following that up to where those lines appear to stop—— A. Yes.

Q. ——can you tell us what elevation that is?

(Testimony of Lester Earl Stevens)

A. This would be approximately 150 feet.

Q. And extending from the extreme side of the markings that you say is an upright to the steel bars is what distance at that point?

A. I don't know if I get your meaning, exactly.

Q. The distance from the steel bars over to what is presumably the upright.

A. Your timber would carry up to your form. You notice we didn't check all this in. We didn't take the time [289] that day. Apparently this is the last one. You will notice these timbers are carried right out. Mr. Soule didn't take the time to carry the drawing all the way to the top.

Q. My question is, what distance does that show from this upright out to the reinforcing steel?

A. I couldn't tell you. At this elevation here I would say the outside timber, if it was drawn in the same as the rest of them, would be possibly four to five feet.

Q. An the outside upright timber, do you mean?

A. Yes, vertical timber.

Q. Did you notice that that was drawn marked a half inch to a foot?

A. No, I didn't notice.

Q. And isn't that better than three inches from that upright out to that reinforcing steel?

A. Well, I am referring to an upright that is continued up here. Mr. Cochrane, if I might say, distinctly went over this pier with his hand that way (indicating) and he said, "We are going to continue that right to the top."

(Testimony of Lester Earl Stevens)

Q. How long is this drawing?

A. I haven't measured it. I would say between eight and ten feet.

Q. How wide? A. Four feet.

Q. Would you hold one end of that? I want to unroll it. (Exhibit unrolled.) How long is that?

A. It looks like eight to ten feet to me. I would say approximately ten feet.

Q. And the drafting table, you think, was as big as that?

A. It would have been every inch as long, very close to it.

Mr. Wrigley: That is all. [290]

ALEXANDER COCHRANE,

called as witness on behalf of plaintiff in rebuttal;
sworn.

Direct Examination

Mr. Moore: Q. Mr. Cochrane, in 1939 and 1940 were you employed by the Union Paving Company?

A. Yes, sir.

Q. In what capacity in the fall of 1939?

A. As field superintendent of their bridge work.

Q. Were you present at a conference at which Mr. Soule, Mr. Stevens and Mr. Dowling were present sometime in December of 1939?

A. Yes, sir.

Mr. Wrigley: I object to this as incompetent, irrelevant, and immaterial, and an attempt to vary

(Testimony of Alexander Cochrane.)

the terms of a written contract in violation of Section 1625 of the Civil Code.

The Court: The objection is overruled.

Mr. Moore: Q. Can you fix the date of that conference?
A. I think I can.

Q. What date was it?

A. I would say December 29, 1939.

Mr. Moore: I might say, your Honor, we had a transcript made—I haven't the certified public accountant here because I didn't expect that there would be any question—but I have asked our opponents to produce the log from the back of their daily sheets, and that log shows Mr. Dowling telephoned to Mr. Cochrane on December 28th, and Mr. Cochrane was in San Francisco on December 29th. If there is any question about it, we will bring the certified public accountant out to show he made those copies.

Mr. Wrigley: If you had asked earlier, I could have produced the log. I couldn't say whether it is correct, or not. Mr. Hunt says that is right, the log shows that.

Mr. Moore: Q. Mr. Cochrane, how did you go to the Soule [291] plant that day?

A. Mr. Dowling picked me up at 9th and Market somewhere around between 7:00 and 7:30, and we drove out to Mr. Soule's plant.

Q. What time did you arrive there?

A. Around fifteen minutes to eight, I think it was.

(Testimony of Alexander Cochrane.)

Mr. Wrigley: Can we stipulate, Counsel, that my objection goes to this entire line of examination?

Mr. Moore: It will be so stipulated.

Q. Was Mr. Soule there when you arrived?

A. I don't think so, but they came shortly just a few minutes after us. I know we all arrived about the same time.

Q. Then what happened? Can you tell us?

A. Well, we went into Mr. Soule's private room for a few minutes, and then we proceeded upstairs to this detail which has been exhibited here and commenced to talk about how we would lay out the falsework, which was practically left up to me as superintendent of the job. I immediately started to go into detail with Mr. Soule. I tried to show the method that we would use in putting up this falsework to pour our concrete, and I thought it might be helpful to them, and naturally would reduce their price by using this falsework, which was something we had to have, ourselves, to pour our concrete.

Q. Did you tell them that at that time?

A. Yes, sir.

Q. Was Mr. Dowling present?

A. Mr. Dowling was present.

Q. Did you outline to Mr. Soule the type of structure that you intended to put up?

A. Yes, I talked to Mr. Soule and he took the T-square and laid it out just as it is shown on that design, there.

Q. You have seen this design before, have you?

A. Yes, sir.

(Testimony of Alexander Cochrane.)

Q. I will call your attention to Plaintiff's Exhibit 22. Is [292] that the design that you refer to?

A. That is it. I know that is it without opening it out. I have seen it much lately. I don't know that there is any use wasting much time.

Q. What did Mr. Soule do, lay out the description of this on this as you described it to him?

A. That is what he done.

Q. Did you watch him lay it out?

A. Yes, sir.

Q. Did you check it as he laid it out?

A. We had a conversation going around all the time about the different methods that would be used, and he would put it down. Sometimes he would erase it and change it a little bit, until they got the idea what we wanted and what they would have to do, and if it was of any use to them, it would govern their price accordingly.

Q. And that as said there at that meeting?

A. Yes.

Q. How long did that meeting take place in the drafting room?

A. We were four hours in the morning and practically one hour after lunch.

Q. When you got through in the morning what did you do?

A. We went down to Manning's, on Brannan street, and had lunch, and then went back again and put in another hour upstairs in the drafting room.

Q. Who went to lunch that day?

(Testimony of Alexander Cochrane.)

A. Mr. Dowling, myself, Mr. Soule and Mr. Stevens.

Q. You went to lunch at Mannings and came back after lunch, and you went up to the drafting room again? A. Yes, about one hour.

Q. Who was there with you then?

A. Mr. Dowling, Mr. Stevens, Mr. Soule and myself.

Q. Were further details given of the plan at that time?

A. Just talking over a little bit what we discussed in the morning, to see if there was anything more that we could convince [293] them that would be any good to them, the falsework.

Q. What happened after you spent another hour up there?

A. Mr. Dowling suggested that they could give Mr. Stevens and Mr. Soule a little time to work this, figure it, and see what a proper figure would be, and in the meantime, as described here, he and I took a walk, about an hour, up to the housing project, and we came back in about an hour and went up to Mr. Soule's office.

Q. Then where did you go?

A. To Mr. Soule's private room.

Q. Will you state what occurred there?

A. I would say something like what Mr. Stevens said. In my own words?

Q. I wish you would.

A. All right. Mr. Dowling asked Mr. Soule if

(Testimony of Alexander Cochrane.)

they had arrived at a price, which Mr. Soule said he had, around \$24, I think it was. And I think Mr. Dowling, if I remember right, offered around \$21, and they brought it backward and forward a little bit until the figure was finally arrived at at \$22.50, Mr. Dowling was offering, and \$22.75 Mr. Soule was asking, and, as Mr. Stevens said, we got our heads together—there was such a small difference—we suggested to split the difference, which either he or I suggested to them, and they did, and agreed upon \$22.50, would be the basic price.

Q. I will draw your attention to two documents here that have been introduced in evidence. Plaintiff's Exhibit 21 and Plaintiff's Exhibit 23, and ask you to examine those, Mr. Cochrane. Have you ever seen those before?

A. Yes, sir.

Q. Where did you see them?

A. On December 29th, in Mr. Soule's office.

Q. There are certain interlineations on those in pencil. Were those on those at the time?

A. No, not when we arrived at the [294] price of \$22.50. After we had arrived at that price, then all those items were went over and those pencil writings were put in afterwards to form the contract.

Q. By Mr. Soule? A. By Mr. Soule.

Q. As you discussed them and agreed, he wrote in the pencil memorandum?

A. That is correct.

Q. Do you remember any discussion being had with regard to the pencil memorandum here, "You are to furnish wood support of framework"?

(Testimony of Alexander Cochrane.)

A. Yes, that would come out in the line, in the session that we had upstairs, because at that time that was shown what we intended to use, and this item 7 was changed, cutting out the steel supports and substituting the wood.

Q. Do you know what happened to those at the end of the meeting?

A. Mr. Dowling got a copy, I know, and went away with it to make up the contract.

Q. Do you know what happened to the other one?

A. I presume Mr. Soule kept that one.

Q. Was there any conversation about drafting the contract, there, who would prepare the contract?

A. Well, I think that——

Mr. Wrigley: It is leading and suggestive, but let it go.

A. I think that Mr. Soule and Mr. Dowling, after the price was agreed at—that I would answer I was a little bit out of the picture—and Mr. Soule and Mr. Dowling agreed then to put up—what they wanted to do about it.

Q. You do not know what they did in that regard?

A. No, after that I was practically out of the picture, as far as the drafting of the contract was concerned.

Q. Now, you were superintendent on the job up there, were you? A. Yes, sir.

Q. How long were you on the job, Mr. Cochrane?

A. Until the [295] latter part of July, from

(Testimony of Alexander Cochrane.)

somewhere—I would say I was backward and forward from about the middle of November until the first of the year, until the end of December, 1939, and then after that I was on the job all the time until the latter part of July.

Q. What was the state of the job when you left, generally? What was the condition of Abutment 1?

A. Abutment 1 was complete.

Q. How about Abutment 2?

A. Abutment 2 complete.

Q. How about Pier 1?

A. Pier 1 complete.

Q. How about Pier 2?

A. About, I would say, 35 per cent. complete.

Q. Pier 3?

A. Pier 3 was not over 10 per cent. complete, just the base.

Q. And Pier 4?

A. Nothing—no concrete poured, just the grading.

Q. And Pier 5? A. Grading.

Q. Pier 6? A. Grading.

Q. Pier 7? A. The base poured.

Q. Abutment 3?

A. If it wasn't complete, it was very nearly complete.

Q. Pier 8? A. Complete.

Q. Pier 9? A. Nothing poured.

Q. Pier 10? A. Complete.

Q. And Abutment 4?

(Testimony of Alexander Cochrane.)

A. I think that was practically complete, too.

Q. Directing your attention to Abutment 1, that was the one with the tunnel through it, was it not?

A. Yes, sir, that was the connection to the tunnel.

Q. There was falsework in there?

A. Falsework, yes, sir. [296]

Q. And the labor of putting in that falsework and bracing to hold the tunnel—

A. Yes, sir.

Q. And concrete poured—

A. Yes, sir.

Q. The labor charges and the material charges that went into this job up to the time that you left, were they paid for by the Union Paving Company?

A. Yes, sir.

Q. Did you at any time have any instructions from Mr. Dowling that they should be charged to the Soule Steel Company? A. No, sir.

Q. Up until the time you left you never received any instructions of that kind? A. No, sir.

Q. They were bought and paid for by the Union Paving Company?

A. So far as I know, they were bought and paid for by the Union Paving Company.

Mr. Moore: I think that is all.

Cross-Examination

Mr. Wrigley: Q. Mr. Cochrane, you and Mr. Soule have been friends for many years, haven't you? A. Yes, sir.

(Testimony of Alexander Cochrane.)

Q. When I say many years, how many years have you been friends?

A. Well, Mr. Soule—he has been subcontracting work for firms that I have been superintendent for for twenty years or more that I know of.

Q. Didn't you for a time work for Soule Steel Company?

A. I never worked for Soule Steel Company one day in my life.

Q. Since August, 1940 Soule Steel Company has not been paying you money?

A. Soule Steel Company never paid me one cent in their life.

Q. From January 1, 1940 to July 1st what was the condition of your health?

A. It was good up until about the latter part of June. [297]

Q. As a matter of fact, weren't you quite sick the early part of that year?

A. No, I had a cold with three days off. We had a lot of rain and got rather wet trying to push the job, and I was off for about three or four days.

Q. Do you remember the automobile accident that you and Mr. Hunt had up there?

A. I do, distinctly.

Q. Can you give us the date of that?

A. No, I couldn't. I couldn't set that. I remember the accident distinctly. We were coming home from work about nine o'clock one evening.

Q. That was in April, wasn't it?

A. I think it may have been around that time.

(Testimony of Alexander Cochrane.)

Q. And you were injured, weren't you?

A. I got a little crushed in the breast.

Q. And from that time on were you ever well on that job? A. Yes, sir.

Q. Isn't it a fact that in June you were ordered to San Francisco and you came to San Francisco about July 1st and had all your teeth taken out?

A. No, sir, I was not ordered to San Francisco in June.

Q. What date did Mr. Hunt bring you down?

A. Mr. Hunt brought me down about the third week in July, about the 17th or 18th of July.

Q. That was the last time, wasn't it?

A. I went back on the job one more week after that.

Q. Didn't you come down about the first of July?

A. Yes, it was agreed by Mr. Dowling that I would get about a week off. I had been putting in twenty-four hours a day, seven days a week, and I think that will depress any man, I don't care who he is.

Q. Do you remember how you came to San Francisco on that trip?

A. I think I drove down in Mr. Dowling's machine—no, I [298] didn't. I left it up there. The machine was left. I came by bus.

Q. That was about the 1st of July?

A. I was here in the City of San Francisco, it was the 2nd of July, on a Tuesday, and if my memory is correct, I think the 4th was on a Thursday.

(Testimony of Alexander Cochrane.)

Q. And wasn't that after the Government engineers began complaining about you on the job?

A. I never had no Government engineer complain to me personally on the job, so, therefore——

Q. No complaint to Mr. Dowling?

A. Mr. Dowling can probably answer that.

Q. Didn't Mr. Dowling tell you about that?

A. No, he didn't tell me about that. Mr. Dowling advised me to go and take a few days off and I would come back and be fresh for work the following Monday.

Q. After you took a few days off you came back again? A. I did.

Q. How long did you stay then?

A. About one week and one day.

Q. Didn't the Government engineer again request that you be taken off that job?

A. I don't know, not to me. That is something I got no knowledge of whatever. If they requested that of Mr. Dowling, that is up to Mr. Dowling.

Q. Did Mr. Dowling tell you that the Government engineers had complained?

A. No, sir, he did not.

Q. Didn't you ask Mr. Dowling if you couldn't go to the Government engineers and talk the matter over with them?

A. After I was in San Francisco in his office—Mr. Hunt brought me down—I think it was Tuesday—I was getting my teeth out. Mr. Hunt called me up and made an appointment for me to see Mr. Dowling in the afternoon, I think, of the next day,

(Testimony of Alexander Cochrane.)

Wednesday, and then Mr. Dowling did remark something [299] to me about the Government engineers thought I might be better off the job.

I said, "I am going back to find out the reason." Which I did. And I talked personally with Mr. Jackson, the Government engineer, and I asked him if there was any objection to me on the job. I will say that I wasn't feeling a hundred per cent in health—

Q. As a matter of fact, you weren't well at that time?

A. I wasn't too bad, but I wasn't feeling right. I wasn't myself, I will admit, and Mr. Jackson said he didn't care. Whatever Mr. Dowling said to him, it didn't matter, as long as the job was successful. I had been there and I had been all right—probably I wasn't feeling all right—but if I could handle the job, he would be behind me to stay. That was Mr. Jackson's word.

Q. Didn't both Mr. Jackson—I believe he is referred to as Speed Leonard—point out to you the job was behind in schedule at that time as to every pier, with one exception?

A. Mr. Jackson and Mr. Speed Leonard was the Government engineers on the job—pointed out to me long before that our equipment—for instance, this is one illustration—our equipment on the job—the bunkers and the plant were supposed to be on the job on January 15th. It arrived about March 15th. If that isn't putting the job behind, I don't know what it is. It was no fault of ours on the job.

(Testimony of Alexander Cochrane.)

Q. When you refer to the bunkers, weren't the bunkers up there before that and the storm came and washed them down the hill?

A. The bunkers might have been, but the plant and the conveyor, taking the thing to the mixing batch—they weren't there.

Q. Didn't the whole Columbia plant at Redding get washed out so [300] they couldn't furnish concrete aggregate until long after that?

A. Not while I was there.

Q. When did they complete the rebuilding of the Columbia plant and the bridges to furnish concrete aggregate?

A. Just about the same time as—I think about the same time as we completed our bunkers, but in our visits down to the Columbia plant, they always told us if we need the material, you will have it. We got no satisfaction if they wouldn't supply the material. I think Mr. Dowling and myself personally made two trips down there.

Q. Didn't the Union Paving Company take concrete aggregate, sand, gravel from the Columbia plant to this job the very first day it was possible to get it?

A. They probably did.

Q. And didn't they take it out of there before the bridges going over to the Columbia plant were fully completed?

A. Well, I don't know. The only way I know they could get it out was by coming over the bridges.

Q. And those bridges were all washed out that winter by the rain, weren't they?

(Testimony of Alexander Cochrane.)

A. I think they were, if I remember rightly. Quite a few of them up there washed out.

Q. And the very first day it was possible to get out of that plant, Union Paving Company started hauling sand and gravel from it to their bunkers, didn't they?

A. I would say it was pretty close when they were ready, yes.

Q. How do you fix the date of that conference at Mr. Soule's office when these writings were changed as December 29, 1943?

A. I think Mr. Hunt received the message on December 28th asking me to report in San Francisco the next day.

Q. Where were you at that time?

A. At Redding.

Q. You were at Redding with Mr. Hunt, weren't you?

A. Yes, sir. [301]

Q. On the 28th of December you were at Redding with Mr. Hunt, weren't you?

A. Yes, sir.

Q. Now, on the 27th and 28th of December—the 28th of December to be exact—didn't Mr. Hunt receive from Mr. Dowling in San Francisco and go over with you a draft and notes of a proposed contract?

A. No, sir. Mr. Hunt received something like that, but I was gone before that arrived by mail.

Q. Showing you a writing consisting of a blue slip and three yellow sheets, on which there is contained a notation at this time, "Plaintiff's Exhibit

(Testimony of Alexander Cochrane.)

E, Frank L. Hart, Reporter," weren't you at Redding when that came up? A. No, sir.

Q. And you did not go over it with Mr. Hunt?

A. Not that day.

Q. When did you go——

A. The mail comes in eight or nine o'clock in the morning and I left on the ten o'clock a. m. train.

Q. What date?

A. December 28th. I remember seeing that in the Union Paving Company's office on December 30th.

Q. Now, didn't Mr. Hunt have that with the interlineations on and everything at Redding before you left there and returned to San Francisco?

A. No, sir, he did not.

Q. Did you have anything to do on that job at any time from the time you went up there until you left with the matter of sending out bills?

A. Every bill and account, I would say, up to practically the middle of June—maybe the end of June—had to have my O. K. before it left the Redding office.

Q. Did you send out any bills to anybody for anything during the time that you were there?

A. Not that I recollect—I don't think we sent out very many bills out of our office. The bills were sent from the main office in San Francisco. There might have been a minor bill or two. I don't know.

Q. Did you keep any records there of the time of the men, the [302] material, or anything?

A. That was Mr. Hunt's job entirely.

(Testimony of Alexander Cochrane.)

Q. It was Mr. Hunt's, not yours?

A. No, sir. I wasn't the bookkeeper nor the accountant.

Q. Now, in the month of November, 1939, you were in the employ of Union Paving Company, weren't you? A. Yes, sir.

Q. And you were in the employ of the Union Paving Company at the various times when various people were submitting bids to do this work, weren't they? A. Yes, sir.

The Court: We will take a recess for a few moments.

(Recess.)

Mr. Wrigley: Q. Mr. Cochrane, just before the recess, as I undertood your testimony, you knew Mr. Dowling had consulted you with reference to the various bids he had received from various people for the reinforcing steel and other work up there? A. Before the bids went in?

Q. Yes. A. Yes, sir.

Q. No, before the bids went in and after the bids went in.

A. Yes, sir, all the time.

Q. And in particular, he showed you a bid from Sherwood S. Cross, didn't he?

A. I don't recollect of him showing me that bid, but I will say that before the bids were opened in Sacramento we got a bid around \$24 from someone around Los Angeles—might have been the same gentleman—but Mr. Dowling didn't know we had that

(Testimony of Alexander Cochrane.)

bid, because I considered it way too low to put up that falsework, and he never knew we had that bid until he came back from Sacramento.

Q. When did he come back from Sacramento?

A. Probably that evening, probably the five o'clock train. I remember Mr. Dowling came out to the Presidio the next morning and met me.

Q. What date was the bid opened the next morning.

A. October 5, [303] 1939.

Q. I will ask you to look at that bid of Mr. Cross and see if that is correctly dated October 12th and was received approximately October 14th?

A. We might have gotten this one afterwards. We got several quotations afterwards from different people.

Q. So Mr. Dowling could not have had this bid on October 5th or 4th?

A. No, sir, not if it is dated the 12th.

Q. And Sherwood S. Cross is a recognized contractor here on this Coast, isn't he?

A. I don't recollect the man. Heard the name before.

Q. And his offer was shown to you later, wasn't it?

A. I don't recollect. It probably was. I don't remember the contents of it, at all.

Q. And didn't Mr. Dowling tell you that he had a bid of \$24 for erecting the reinforcing steel complete, including the supporters or whatever was necessary to support that steel?

(Testimony of Alexander Cochrane.)

A. I imagine that if Mr. Dowling had that, him and I would converse on the subject, because him and I were the only two that were doing the subletting.

Q. Going back to December 8, 1939, you and Mr. Hunt were together at the Redding office, weren't you? A. I think we were.

Q. And on that date you and Mr. Hunt discussed the matter of a subcontract for this steel work, didn't you?

A. Probably we did. I don't recollect. Probably we did.

Q. And isn't it a fact that after your discussion Mr. Hunt wrote out and you looked it over and you sent to Mr. Dowling a memorandum of situations to go into the contract?

A. No, I wouldn't say it was a fact. I don't remember anything like that.

Q. Showing you this carbon copy of a writing purporting to be [304] dated December 8, 1939, "Memorandum to Mr. J. A. Dowling; Subject Steel Contract," consisting of two pages, I ask you to read that over.

A. It looks to me probably—Mr. Hunt and I were together—we discussed something like that that pertained to how the job was sublet to the Soule Steel Company.

Mr. Wrigley: At this time I ask that this be marked for identification only.

(The document was thereupon marked "Defendants' Exhibit YY for Identification.")

(Testimony of Alexander Cochrane.)

Mr. Wrigley: Q. Showing you, Mr. Cochrane, a picture, I ask you if you can identify that.

A. I think this would be Pier 3 in the process, just about when I left the job, Mr. Wrigley. That is Pier 3.

Mr. Wrigley: I would ask that this be marked for identification.

(The photograph was thereupon marked "Defendants' Exhibit ZZ for Identification.")

Mr. Moore: Introduce it. We will have no objection.

Mr. Wrigley: I will introduce it then for ease in marking it.

(Defendants' Exhibit ZZ for Identification was thereupon received in evidence.)

Mr. Wrigley: Any objection to marking this last one? I wanted to prove it by Mr. Hunt.

Mr. Moore: I want to look at it.

Mr. Wrigley: That is all right.

Q. Referring now to this picture marked Defendants' ZZ, which you have identified as Pier 3, which is the first pier immediately to the south of the Pit River, I will ask you to examine that again and tell us whether those are not the concrete mixers [305] shown just above the steel work, there?

A. It is self-evident they are.

Q. That is a fact, isn't it? Now, those concrete mixers were used to pour the concrete in the base, weren't they? A. Yes.

(Testimony of Alexander Cochrane.)

Q. Was any staging necessary to pour that concrete in the base? A. Yes.

Q. How was that concrete transported from those mixers down?

A. It was transported through a chute into a hopper that I would say off-hand was 25 feet below those mixers, and then the contents of that bottom hopper was dumped into what we call industrial cars, and they were run onto tracks and deposited through elephant trunks into the base of the pier.

Q. I will show you this picture, Mr. Cochrane; can you identify that?

A. No, that was after I was gone.

Q. You can't identify this picture, then?

A. No.

Q. Calling your attention in this picture to the hoist with the long boom on it, wasn't that there all the time that you were there?

A. The Soule Steel Company had a machine with a boom similar to this. I don't know whether this is the one, or not.

Q. Can you identify this picture?

A. No, sir. That was after my time.

Q. Was this picture after your time, also?

A. There is nothing there that shows that I can identify.

Q. Now, Mr. Cochrane, with reference to the electric signal system, that was installed on the various towers when you were there; that was the signal system used by the various men signalling to hoist the reinforcing steel up to place, wasn't it?

(Testimony of Alexander Cochrane.)

A. I don't know. I had nothing to do with the hoisting of the reinforcing steel. We only hoisted the concrete in our tower. [306]

Q. The electric signal system, for instance, on Pier 3 was used when the Soule Steel men wanted to signal the men below to hoist the steel, and so on?

A. While I was on the job, Mr. Wrigley, Pier 3 was only about ten feet off the ground. Everything was going down. There was no electric system in Pier 3 while I was there.

Q. Do you keep any record or diary of your various trips with Mr. Dowling out to the Soule plant?

A. In my mind I have a record; I have no data, no, sir.

Q. Did you make any written record of it?

A. No, sir.

Q. Do you remember how many trips you went out there with Mr. Dowling? A. Yes, I do.

Q. How many? A. Three.

Q. And the first one was what date?

A. The 17th of November.

Q. And the next one was——

A. On the 18th of November.

Q. On the next?

A. It might have been the 16th or 17th. I might be a day off—no more.

Q. And isn't that the date that the drawings were made out there showing that Soule Steel was going to use a certain type of reinforcing to hold up that reinforcing steel? A. No, sir.

Mr. Wrigley: That is all.

(Testimony of Alexander Cochrane.)

Redirect Examination

Mr. Moore: Q. What did occur at this meeting of November 16th or 17th?

A. Mr. Dowling and myself went out to see the application of the welding of the bars. Mr. Soule had pieces about this long set up just in relation to where they would be in the pier, just to find out how—it being in the steel contract to furnish clamps to hold those bars in place—it was just the method of procedure to see what would be the best clamp to hold them and still let the welder in to do his [307] work.

Q. And was there a test made there?

A. Yes, sir.

Q. At that time was there any discussion of the contract?

A. No, sir, not to my recollection; nothing discussed about the contract.

Q. At the time was this drawing displayed?

A. Never saw that drawing until December 29th.

Mr. Moore: That is all.

The Court: Step down.

Mr. Moore: We would offer, your Honor, and ask that it be opened, Mr. Dowling's deposition, which has been returned to this court by the notary public who took it.

Mr. Wrigley: We make the same objection to that; it is not admissible as a deposition. He is here

personally in court. Further than that, the major portion of that deposition is an attempt to go into matters occurring during the period of negotiations prior to the 6th day of January, 1940, and therefore is incompetent, irrelevant, and immaterial under Section 1625 of the Civil Code.

Mr. Moore: That is the same objection that has been urged, and I believe the deposition of a litigant can be introduced, your Honor.

Mr. Wrigley: I know of no rule of the Federal Court allowing a deposition to be introduced.

The Court: What is the purpose of introducing this?

Mr. Moore: Largely impeachment, to show a difference in the story that Mr. Dowling told then and the one he is telling now on the witness stand.

Mr. Wrigley: I submit it is not admissible under the [308] Federal Rules. They may use it to examine or cross-examine him while he is a witness on the stand, but to introduce a deposition as a whole, I know of no basis for it under the Federal Rules.

Mr. Moore: I would like to take a look at the rules on that, your Honor. In state practice it is proper, I am certain.

Mr. Wrigley: Both state practice and federal practice are quite specific that you have no right to admit it.

The Court: I will give you an opportunity to look that up.

Mr. Moore: Thank you. That is our case, then, your Honor.

LOREN HUNT

called as a witness on behalf of defendants in surrebuttal, having been previously duly sworn, testified as follows:

Mr. Wrigley: I do not find my notes handy, but maybe Mr. Moore has in mind, and no objection, that on the first day of the hearing I introduced certain letters and had them marked for identification. They were so introduced and marked for identification, but were not offered in evidence. Do you want me to point those out specifically?

Mr. Moore: I do not think it is necessary.

Mr. Wrigley: They are before the Court and have been read, but only marked for identification. We offer those.

The Court: The Clerk has them. If there is no objection, they will be admitted.

(The documents heretofore marked Defendants' Exhibits C, G, and H For Identification were thereupon received in evidence.) [309]

Mr. Wrigley: Q. Mr. Hunt, showing you what has been marked Defendants' Exhibit YY For Identification, I will ask you if that is a correct copy of the writing drawn up by you in conference with Mr. Cochrane at Redding and sent to Mr. Dowling?

A. That is.

Q. At the time that it was drawn up, the provision that all staging to be furnished by the subcontractor here—was that discussed with Mr. Cochrane?

(Testimony of Loren Hunt.)

A. All matters in that were discussed with Mr. Cochrane.

Q. Did he have any suggestions that were other or different than that at the time?

A. No, that was the meat of the discussion.

Q. After this was written up did he go over it before it was sent to Mr. Dowling?

A. I am sure he did.

Mr. Wrigley: We offer this as Defendants' Exhibit YY.

Mr. Moore: No objection.

(Defendants' Exhibit YY For Identification was admitted into evidence.)

Mr. Wrigley: Q. Now, was Mr. Cochrane at Redding at the time you went into the later draft of a contract specifically with Soule for this job?

A. In reference to that you have in your hand?

Q. Yes.

A. I believe he was there when it arrived.

Q. Did you have any discussion with him as to its contents or provisions?

A. I had discussions with Mr. Cochrane on everything that came in.

Mr. Moore: I ask that the answer go out as not responsive.

The Court: It may go out.

Mr. Wrigley: Q. Asking you specifically with reference to this actual document—

A. I believe I did. [310]

Mr. Wrigley: For the purpose of the record, I

(Testimony of Loren Hunt.)

would ask that this be marked for identification at this time.

(The document was thereupon marked "Defendants' Exhibit AB For Identification.")

Mr. Wrigley: Q. Mr. Hunt, from the notations appearing on this writing, can you tell me the date it was received by you at Redding?

A. I would say it was received on the 28th.

Q. Can you say when you sent it back?

A. Probably the same day. It was received in San Francisco on the 29th.

Q. All mail came to you at Redding at that time? A. Central Valley.

Q. Well, mail at that time addressed to you or to Union Paving Company came to you, did it not?

A. That is right.

Q. Did Mr. Cochrane make any suggestions with reference to this writing before it was sent back by you?

A. No, it was mutually agreed on the writing, I am sure.

Q. I didn't get the answer.

A. It was mutually agreed on the writing.

Q. Let me ask you another question and maybe clear that up. When you refer to the writing, do you mean the typing that is on here, or the pencil writing that is on it?

A. The pencil notes that I put on it.

Q. Did you at that time or prior thereto have any discussion with Mr. Cochrane as to the expense of the interior falsework, or framework?

(Testimony of Loren Hunt.)

A. Prior to——

Mr. Moore: I am going to object, your Honor, to that on the ground it is incompetent, irrelevant and immaterial. What discussion they may have had I do not think has any particular bearing.

Mr. Wrigley: We take the position, if the Court please, [311] that Mr. Cochrane is their witness and an adverse witness, and that we have the right to impeach his testimony by showing that he discussed and agreed that the cost of that work was to be borne by the subcontractor.

Mr. Moore: He has testified in regard to a certain conversation that was had on December 29th. You come in here with a letter of December 8th, which is twenty days before you come in with another one. The witness is certainly very doubtful about receiving or discussing it with him, and there is nothing there that appears that Mr. Cochrane had anything to do with this particular letter. I think it is incompetent, irrelevant, and immaterial, even if they had a discussion. If these two men had a discussion with regard to this, I do not see how it could impeach Mr. Cochrane's testimony in the slightest, your Honor.

Mr. Wrigley: Mr. Cochrane has testified that Union Paving Company was not to bear that expense. Now, in impeachment of that, I want to show, both by Mr. Hunt and by Mr. Dowling, that at all stages——

Mr. Moore: I will withdraw my objection. Go ahead. I will withdraw the objection, your Honor.

(Testimony of Loren Hunt.)

Mr. Wrigley: Q. Have you in mind the question, Mr. Hunt, I was asking you?

A. About after this contract?

Mr. Wrigley: Would the reporter read the question, please?

(The question was read by the reporter.)

A. At that time—that is what I was questioning.

Mr. Wrigley: Q. Yes; did you have any discussion with him at that time as to who was to bear that expense?

A. At the time prior to January?

Q. No, at the time of this writing of December 27th, 28th, and 29th, 1939. A. Yes. [312]

Q. Did Mr. Cochrane say that Soule was to bear that?

Mr. Moore: I suggest that that is rather leading.

Mr. Wrigley: I beg your pardon. That is correct.

Q. What was said about the expense of the interior falsework or framework?

A. We would build a scaffolding over the base.

Q. Whom do you mean by “we”?

A. The Union Paving Company, but from there on up it belonged to the subcontractor.

Q. And you fix the date of that conversation as what date? When did that conversation occur?

A. That was prior to the 29th, immediately before he went to San Francisco.

Q. Was there any discussion at the time when

(Testimony of Loren Hunt.)

this particular writing came up as to who was to bear that?

A. The subcontractor was.

Mr. Moore: I ask that that go out.

The Court: It may go out.

Mr. Wrigley: Q. Not what you understood, but was there any discussion or statement as to who was?

A. I can't remember any definite statement.

Q. After December 8, 1939, when you drew the first memorandum which said, "All staging to be furnished by the subcontractor"—was there any discussion with Cochrane on that subject, at all?

Mr. Moore: I am going to object to this, your Honor, because this letter is exactly contrary to that, if it is read in its entirety. Mr. Wrigley takes one sentence out of the entire letter. If you want to read the letter, I will withdraw the objection.

Mr. Wrigley: Accepting counsel's suggestion, I will read the letter, the letter being dated December 8, 1939:

(The document referred to was thereupon read by Mr. Wrigley.) [313]

Mr. Wrigley: Q. At any time after December 8th was there any discussion between you and Mr. Cochrane to the effect that Union Paving Company was to bear all the expense of the interior false-work? A. No.

Q. Did Mr. Cochrane ever make any such statement to you or in your presence?

A. He made no statement that the Union Paving

(Testimony of Loren Hunt.)

Company was to bear the entire cost of the false-work.

Q. With reference to the lumber used in the spacers, who bought that lumber and paid for it?

A. The Union Paving Company.

Q. I am talking now about the spacers. How would that be removed?

A. It was necessary to cut them up into small pieces and pry them out.

Q. So was it ever possible to use any of that material for spacers over again?

A. No, but there may have been occasions where they might have gotten small parts of them. On the whole, they couldn't use them over.

Q. But the templates, until they were worn out or too short, might have been used over and over again as long as there were usable portions, is that correct?

A. That is correct.

Q. Now, who bought the lumber——

The Court: We went into this testimony fully, also the expense of the lumber used, whether or not it could be used again. There is no need for a repetition of that.

Mr. Wrigly: No further questions of this witness.

Cross Examination

Mr. Moore: Q. You say you discussed this letter here with Mr. Cochrane at the time of its receipt?

A. Yes, sir.

Q. Well, isn't it a fact that you placed a rubber stamp on it showing the date of its receipt?

(Testimony of Loren Hunt.)

A. Yes, sir.

Q. That is December 28th, isn't it?

A. Yes, sir. [314]

Q. Received at Redding. A. Yes, sir.

Q. What time does the mail get in?

A. Usually in the morning, around eight or nine o'clock.

Q. Eight or nine o'clock. Can you be more exact?

A. It is according to what time the trains get in.

Q. Those are the trains from San Francisco?

A. The trains come in four in the morning that the mail arrived on.

Q. When did you have this conversation with Mr. Cochrane about this particular letter?

A. In the morning.

Q. What time?

A. Right after we opened the mail.

Q. What time did you open the mail?

A. Say nine or ten o'clock.

Q. What day did Mr. Cochrane leave for San Francisco?

A. I think he left on the 28th.

Q. The 28th; the day of the receipt of the letter? A. Yes.

Q. He left on the morning train?

A. There was a train at one *one* o'clock.

Q. It is your recollection he went on the one o'clock train? A. It is.

Q. And that you talked this letter over with him in the morning? A. Yes.

(Testimony of Loren Hunt.)

Q. Referring to the letter of December 8th to Mr. Dowling, you wrote this letter, didn't you?

A. Yes.

Q. You say you discussed it with Mr. Cochrane?

A. Yes, sir.

Q. Isn't it a fact that at the time that this letter was dictated, you, as an engineer, were making various estimates of how to handle this job, conferring with Mr. Cochrane?

A. That is right.

Q. And you were rendering this memorandum to Mr. Dowling for his information, isn't that correct?

A. That is right.

Q. As a matter of fact, you and Mr. Cochrane discussed a [315] half dozen methods of handling the transaction, didn't you?

A. We discussed quite a few.

Q. And this letter was being furnished to Mr. Dowling for his information in negotiating possible contracts, isn't that correct?

A. That was sent to San Francisco probably on Mr. Dowling's request.

Q. It was sent in, and you and Mr. Cochrane had conferred as to the different methods of handling the job?

A. That is right.

Q. After you had done so, you wrote this out, after conferring with Mr. Dowling as to your ideas of what should be embodied in the contract?

A. That is right.

Mr. Moore: That is all.

J. A. DOWLING,

recalled as a witness for defendants in Surrebuttal, having been previously duly sworn, testified as follows:

Direct Examination

Mr. Wrigley: Q. How many conferences did you have at Sacramento on or about October 4, 1939 with Mr. Soule with reference to a bid or a sub-bid of the work of the Pit River job?

A. My best recollection is he came up to my room about midnight of the 4th and woke me up, he and Mr. Mahon, and wanted to give me a bid, and I said I didn't want to talk about a bid then. Our items had all been filled in. And I would see him later if I was the successful bidder. We didn't arrive in Sacramento until eight o'clock or nine o'clock at night; went up on the five o'clock train and went right up and went right to bed. I didn't want to be annoyed, because the steel men and other salesmen around the hotel bothered you to death. I went right up and went to bed.

Q. Did Mr. Soule, or anyone on behalf of Soule Steel Company, [316] submit to you any figures on that day or the next day?

A. They did not. I particularly told them I did not want to take a bid, because I didn't want to be under any obligations to him or to anyone else until after we had gotten the job.

Q. Calling your attention to this particular drawing that has been marked "Plaintiff's Exhibit 22," have you examined it heretofore as I have rolled it out? A. Yes.

(Testimony of J. A. Dowling.)

Q. When was the first time you saw this drawing?

A. When I was on thhe stand the last time.

Q. Did they ever have that drawing at any time when you were at the office of the Soule Steel Company?

A. They certainly did not. That of the Soule Steel Company was on brown paper, and not as wide as that.

Q. How wide was it?

A. I would say about two and a half feet wide, something like that.

Q. And about how long?

A. About ten feet.

Q. Was it fastened to the drafting table?

A. It was fastened to the drafting table, yes; never hung on the wall, either. It was always on the drafting board.

Q. Now, on that drawing were there any markings or anything showing the interior falsework or framework for supporting the reinforcing steel?

A. Yes, that was the idea of the drawing.

Q. What did it show?

A. Well, it showed various types or methods that might be used to support the steel.

Q. What date was that particular drawing that you have in mind?

A. That particular date was the 17th of November.

Q. How do you fix that date?

(Testimony of J. A. Dowling.)

A. I have it in my diary, a note of it.

Q. Who was present at that conference when that particular drawing was shown?

A. Mr. Soule, Mr. Dohrman, who drew it up on the [317] drafting board, and Mr. Stevens and Mr. Cochrane.

Q. You have your diary showing that was the 17th day——

A. 17th day—it was on a Friday. That was the day we went up to the Manning Coffee house and had lunch, came back, and spent the whole day there. We didn't leave until late that afternoon, and we went back Saturday morning.

Q. At that conference was there any discussion as to price? A. There was not.

Q. Did the drawing they had on that day show the staging or interior framework for the entire piers, one particular pier, or what?

A. Oh, no, just a sample pier.

Q. Any particular pier, type of pier?

A. No, there was no particular pier. They were just making up a pier. All those piers were practically the same, except as to size and height.

Q. Was there any sketching on that drawing as to the staging or interior falsework or framework above the base? A. Yes, there was.

Q. Was any conversation had as to who was to put it in at that time?

A. Yes, they were to put it in above the base of the piers, and we were to supply the cribbing to

(Testimony of J. A. Dowling.)

hold up the platforms at practically the ground level of the country up there.

Q. Coming down to the contract of January 6, 1940, was it your understanding at the time you signed that contract that you were to put up the framework, or that Soule was to put it up, or that the Union Paving were to put it up and Soule pay for it?

A. It was my understanding that anything above the base Mr. Soule was to be responsible for.

Q. And was that the discussion had at that time, or when? A. Yes. [318]

Q. Now, calling your attention to this particular writing which has been marked "Plaintiff's Exhibit 21," bearing date December 11, 1939, did you first receive that with or without the pencil interlineations?

A. Mr. Soule brought it into the office, and at the desk at the office, wrote that in.

Q. When you say the office——

A. Our office, the Union Paving Company office.

Q. What date?

A. That was on the 6th of January.

Q. He brought this in on the 6th of January?

A. Yes.

Q. As to this interlineation that appears here, was that made on that date or prior thereto?

A. Made on that date.

Q. Did this writing with the pencil interlineation—was it agreed to by you, accepted?

(Testimony of J. A. Dowling.)

A. Why, no. This contract that he signed—this was a proposed contract that I sent up there to have him look over and was drawn up long before this occurrence.

Q. Now, except as stated in that writing of January 6, 1940, did you agree to any of the provisions in this offer?

A. I didn't agree to anything at any time. They were very anxious to get me committed as early as they could.

Q. The various other bids that you testified to receiving—one of them is here in writing, the other is oral—did any of those bids provide or contemplate that Union Paving was to install the interior falsework or framework against which the steel was to rest?

A. Not from my interpretation of the bids.

Q. Was Mr. Cochrane ever a stockholder or officer or director of the Union Paving Company?

A. Never was.

Q. Was Mr. Cochrane present or consulted about your actual agreement signed on January 6, 1940?

A. He was not there at [319] the time.

Q. When was the first time that you learned that Soule Steel Company was not being charged for any of the interior falsework or framework?

A. At the time Mr. Morisette came up there and started to get the job straightened down a little bit.

Q. Now, with reference to the various later statements that were sent to Soule Steel Company,

(Testimony of J. A. Dowling.)

did Mr. Stoddard ever come down to your office before any of those statements were sent?

A. What do you mean?

Q. I will withdraw that question and reframe it. When was the first time Mr. Stoddard ever came down to your office and go over the figures as to the cost?

A. After we completed the job. He came down there a while himself and said it was too much, and sent one of his bookkeepers down.

Q. Approximately what day?

A. It was after the job was completed, shortly after the job was completed.

Q. He was never there at any time while the work was going on, to your knowledge?

A. No, he did not come in until the work was completed.

Mr. Wrigley: That is all.

Cross Examination

Mr. Moore: Q. Do I understand you now the first time you ever saw this letter of December 11th was when Mr. Soule brought it into your office on January 6th? A. Yes, sir.

Q. And the interlineations were made at that time?

A. Made in that office on that day, yes, sir.

Mr. Moore: I would ask that the witness' deposition be opened, your Honor.

The Court: You may open it.

Mr. Moore: Q. I will call your attention to your deposi- [320] tion, Mr. Dowling.

(Testimony of J. A. Dowling.)

Mr. Wrigley: What page?

Mr. Moore: Page 35, and then at page 40. Commencing at line 20:

“Q. Now, you have produced a memorandum, apparently unsigned, dated December 11, 1939, on the letterhead of the Soule Steel Products Company, with certain pencil memoranda thereon.

A. Yes, sir.

Q. Can you identify that handwriting that is on there?

A. I believe it is Mr. Soule's handwriting.

Q. And can you tell us when this particular document came into your possession?

A. I would say somewhere along the date it bears.

Q. Was that delivered to you by Mr. Soule, or how did it come into your possession?

A. Yes, Mr. Soule brought it into the office himself.

Q. He brought it into your office?

A. Yes.

Q. Have you any recollection of the circumstances under which he brought that in?

A. Well, he was trying to close the contract.

Q. At the time he brought it in were these pencil memorandums on it?

A. No, they weren't; they were put on in the office.”

Turning over to page 40, line 22:

“Q. And your recollection is that this document

(Testimony of J. A. Dowling.)

dated December 11th, which is 'Plaintiff's Exhibit D,' that was given to you about the time of December 11th, 1939?

A. Yes, about that time I would say.

Q. At the time it was given to you none of these interlineations were on there?

A. Yes, sir; he sat down in the [321] office and wrote them out right at the desk.

Q. And were they discussed?

A. Probably, more or less.

Q. Well, were they?

A. He just didn't come in and write them down and hand them to me. We discussed them back and forth. There is no question about it."

Q. Now, you gave that testimony, didn't you?

A. I did.

Q. Was this delivered to you now on January 6th or December 11th?

A. Well, it might have been given to me, and probably was given to me on the 11th, sent on probably by mail or something else, I don't know, but the changes were not made in it until the date he came in the office.

Q. You desire to change the testimony you gave in that connection? A. Yes, sir.

Q. I will ask you if this is not your testimony page 41, line 9:

"Q. And each subject matter was discussed, and was there an agreement reached between you and he?

(Testimony of J. A. Dowling.)

A. No, there was no agreement reached until the day we signed the contract.

Q. Well, for instance, take paragraph 3 here: 'We are to be responsible for the unloading, checking and handling of said reinforcing steel upon arrival at Redding upon a lot to be provided by you.' And then 'you' is marked out, and 'us' is inserted. '(We estimate the storage lot size should be about 150' x 350' and adjoining a rail track.)' That is scratched out.

A. Let me see.

Q. 'the rental of which shall not exceed \$30.00 per month.' That has been written in.

A. All of that entirely is Mr. Soule's writing in pencil. There is none of my writing there.

Q. Was that change discussed with you?

A. That change? [322]

Q. Yes. Did you discuss about the lot?

A. Yes. That wasn't a change. I had rented the lot for \$25.00.

Q. I mean his drawing a line through there, and writing that on there, didn't that meet with your accord at the time?

A. Yes. This is one of the paragraphs—this includes one of the paragraphs of the contract providing for the unloading and warehousing and taking care of the material, and I had made arrangements for a lot there—for Mrs. Kite's lot at \$25.00 a month. In fact, I believe that day I was up there I brought Mr. Soule down and showed him the lot.

Q. Now, paragraph 5 reads: 'You are to provide an easy and accessible roadway from the main high-

(Testimony of J. A. Dowling.)

A. That we proposed——

Q. The type that you proposed to use, yourself?

A. No, sir, the method that Mr. Soule was going to use to support the steel. [324]

Q. Let us not fence with words. Was it his idea to put 10 by 10's in?

A. No, not in the base of the hole. That was ours.

Q. Well, anywhere along the line.

A. I don't know. He made the various types—Mr. Cochrane was the 10 by 10 man, and that was only for the base of the hole. Beyond that and above that it was entirely up to Mr. Soule.

Q. But you went out later and bought old second hand steel rails and used them all the way through there?

A. It was a good deal cheaper than the other method.

Q. You did not consult Mr. Soule about it, did you?

A. No.

Q. You went ahead and got permission of the United States authorities to put steel rails in in place of the 10 by 10's?

A. Yes, you are correct in that.

Q. Because using the 10 by 10's, they would have to be pulled out afterwards and the cavity filled with concrete?

A. That is correct.

Q. From the standpoint of pouring concrete, it would have been much more satisfactory to have

(Testimony of J. A. Dowling.)

the steel remain in there because in a sense that would be reinforcing steel, itself?

A. That is correct.

Q. And you bought those steel rails without ever consulting Mr. Soule? A. Yes, sir.

Q. As a matter of fact, in your testimony given the other day didn't you state that you knew these monthly billings from Soule were being rendered to you and your company was expending money?

A. Yes, sir, up to July.

Q. You knew right from the beginning your company was paying bills for material that was being used in the falsework and framework up there, did you not? A. Yes, sir.

Q. Not after the job had gotten under way after Mr. Morisette was [325] there, but you knew it from the date the job was started?

A. Yes, about the middle of March.

Q. They went through your office?

A. Yes.

Q. And you paid those bills?

A. The bills were paid.

Q. And you never consulted Mr. Soule about them?

A. No, I consulted Mr. Stevens in July as soon as Mr. Morisette came up there and got straightened around and organized.

Q. You never talked with Mr. Soule in your life about any obligation on his part to put these in until after you had served notice on him or caused notice to be served on him in October, that

(Testimony of J. A. Dowling.)

if he did not proceed with the placing of this, you were going to terminate his contract?

A. I never told him I would terminate his contract. I don't believe that.

Q. You saw the letters introduced here over Mr. Lawton's signature?

A. I do not recall that, but I imagine what it was, we were going to go ahead and do it and charge it to his account.

Q. You were going to take over his contract?

A. Yes.

Q. Up to that time had you ever spoken to Mr. Soule personally about this matter?

A. No, but I spoke to his man who was on the jobsite right along.

Q. Why didn't you go right straight to Mr. Soule, who signed the contract?

A. That might have been the better thing to do, but the man was on the job and conversant with everything that was going on there, and was on the job regularly.

Mr. Moore: I think that is all, your Honor.

The Court: Step down. Is that the case gentlemen?

Mr. Moore: That is our case, your Honor.

Mr. Wrigley: Yes. At this time I want to renew my motion to strike out in its entirety the testimony of Mr. Mahon, the testimony of Mr. Soule, the testimony of Mr. Stevens, and also [326] the rebuttal testimony on behalf of Hunt, Morisette, and Dowling as to the conversations with respect

to offers that were had prior to January 6, 1940, on the ground that they were all merged into the written contract, and that you have no right to vary, or change, or consider the terms of a written contract where the parties have reduced it to writing.

The Court: You may reserve your motion on that, and I will give you an opportunity to argue that at the proper time.

Mr. Wrigley: Yes, your Honor.

The Court: Is the matter submitted?

Mr. Wrigley: The matter is submitted.

The Court: The evidence is now submitted on both sides?

Mr. Moore: Yes, your Honor—on our side.

Mr. Wrigley: Yes.

The Court: Submitted. Now, in what manner do you want to dispose of it?

Mr. Moore: I would just as soon argue it orally, your Honor.

(After a brief discussion, the matter was set for Monday, April 19, 1943, at 2:00 o'clock p. m. for argument.) [327]

Mr. Wrigley: Mr. Stevens on the stand has admitted that the spacers, separators, templates was clearly their work. The evidence showed they did not buy any lumber for that, and I think the evidence shows pier 4, which was the last and the biggest pier there, the labor of putting up those spacers and templates was all furnished by the Union

Paving Company, and they were not paid for that.

The Court: What did that amount to?

Mr. Wrigley: That amount has never been shown.

The Court: How do you expect this court to determine it?

Mr. Wrigley: I will say the burden is on them to show they have done it or they have not earned \$22.50. In other words, they have got to show that they have performed to earn \$22.50, and they have not shown it yet. But keep in mind that under Section 21 of the Master Contract, which is in evidence, it is provided, "The contractor shall begin work within thirty calendar days after date of receiving notice to proceed," (reading).

Section 22 of the contract goes on to provide a penalty of \$100 a day per unit, and the statement in evidence shows that the contractor has been charged \$46,000 here because of delays.

The Court: How many of those days were put on Soule?

Mr. Wrigley: I wouldn't know how to answer that.

The Court: How do you expect me to answer it?

Mr. Wrigley: We do not accept that, frankly, and I introduced evidence upon it—they are attempting to charge too much penalty for delay; but the fact is at all times after Mr. Morisette went up there in June until they were through he was continually after the Soule Steel Company to cooperate to hurry it, to expedite it, and there was some delay, some amount—I am not saying how much,

because I do not think it is material now—chargeable to Soule Steel Company for delay.

The Court: So that you are not misled, if you are not able to determine it, you can't expect this Court to determine it.

Mr. Wrigley: I do not expect this Court to determine it, because we at this time do not——

The Court: You have submitted your case here on the record. I do not want to mislead you. I would be idling your time as well as mine.

Mr. Wrigley: But my point is this: Mr. Moore said that a certain amount is too much money held back because of false work. We say at the time that money was held back, it was held back not only because of the interior falsework, but because of a claim of damages for delay, and the letters so show. We will take the letter of February, 1941—February 15th, if I remember the date—which showed specifically at that date that there were certain charges for various items aggregating in all \$41,000, and in addition to that sum, it did not include a claim of damages against Soule for having delayed the performance of the job. That was one of the bases for the countercharges at that time, as pointed out in that letter.

(Mr. Wrigley continued his argument, at the conclusion of which the following occurred:)

The Court: The Court is prepared to dispose of the case, unless there is some other matter you want to submit.

Mr. Moore: No, your Honor.

The Court: It will be the judgment of the Court

that the plaintiff prevail in this case. Now, there is an answer and a cross-complaint here that will have to be disposed of. I do not know anything that has been proved here that I can give any credit for in that respect. If there is anything you can point out, you may do so. Prepare your judgment.

Mr. Moore: Yes, your Honor.

The Court: You had better prepare findings, so there is no question about it.

Mr. Moore: I will prepare findings.

Mr. Wrigley: The matter of findings—I presume you will prepare them?

Mr. Moore: I will prepare them.

Mr. Wrigley: It will be submitted to me?

Mr. Moore: Very well.

[Endorsed]: Filed April 19, 1943.

[Endorsed]: No. 10571. United States Circuit Court of Appeals for the Ninth Circuit. Union Paving Co., a corporation, Pacific Indemnity Company, a corporation and Maryland Casualty Company, a corporation, Appellants, vs. United States of America, for use and benefit of Soule Steel Company, a corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed September 27, 1943.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 10571

UNITED STATES OF AMERICA, for use and
benefit of SOULE STEEL COMPANY, a cor-
poration,

Appellee,

vs.

UNION PAVING CO., a corporation, PACIFIC
INDEMNITY COMPANY, a corporation, and
MARYLAND CASUALTY COMPANY, a
corporation,

Appellants.

STIPULATION DESIGNATING PARTS OF
THE RECORD TO BE PRINTED

It is hereby stipulated by and between the parties
to the above entitled action that those parts of the
record on appeal hereinafter described be printed,
and the Clerk of the above entitled Court is re-
quested to cause to be printed and reproduced in the
printed record those parts of the record which the
parties hereby designate as follows:

1. Complaint.
2. Association of Attorneys.
3. Answer and Cross-Claim of Defendants.
4. Answer to Cross-Claim.
5. Amendment to Answer to Cross-Complaint.
6. Order denying defendants' motion to strike
certain testimony.

7. Findings of Fact and Conclusions of Law.
 8. Order judgment entered in favor of plaintiff on findings and defendants take nothing on Cross-Claim.
 9. Motion to fix costs with Cost Bill.
 10. Judgment.
 11. Association of attorney for defendants.
 12. Motion for new trial.
 13. Order denying motion for new trial.
 14. Notice of appeal by defendants and cross-complainants.
 15. Reporter's transcript of April 8, 9, 15 and 16, 1943, pages 1 to 327 inclusive, and remarks of Court and Counsel at time of ordering judgment.
 16. Appellants' designation of contents of record on appeal.
 17. This stipulation.
 18. Plaintiff's exhibits 9, 10, 11, 16, 21 and 23.
 19. Enclosures accompanying exhibit 12, but not the exhibit.
 20. All monthly statements or estimates submitted by Soule Steel Company, omitting therefrom the captioned part of the bill but including the tonnage of steel and the price.
 21. Defendants' exhibits K, X, II, OO and WW.
- Those exhibits introduced by the parties hereto and which are not herein designated to be printed or reproduced in the printed record are omitted either because they are large drawings, charts, photographs and bulky tabulations which have, by order of the District Court, been sent to the United States

Circuit Court of Appeals for the Ninth Circuit for its inspection and use upon this appeal and which it would be impossible or impracticable to reproduce in the printed record but which, subject to objections, if any made when introduced, it is stipulated may be considered by said Court of Appeals in deciding this appeal.

This stipulation is made pursuant to subparagraph 6 of Rule 19 of the United States Circuit Court of Appeals for the Ninth Circuit and it is stipulated by the parties hereto that the parts of the record which it is hereby stipulated shall be printed will contain all parts thereof which are necessary or material to a consideration of the points upon which appellants will rely on this appeal, except exhibits hereinbefore mentioned consisting of large drawings, charts, photographs and bulky tabulations which it is impossible or impracticable to print or reproduce in the printed record; provided, however, that should anything material to either party be omitted from the printed record by error or accident or should anything be misstated therein, the parties hereto stipulate and agree that such omission or misstatement shall be corrected and, if necessary, that a supplemental record shall be printed.

Dated: August 31, 1943.

HENRY F. WRIGLEY

DION R. HOLM

Attorneys for Appellants

THELEN & MARRIN

COURTNEY L. MOORE

Attorneys for Appellee.

Good cause therefor appearing, Ordered original exhibits not included within printed transcript may be considered by the Court in their original form.

WILLIAM DENMAN

United States Circuit Judge.

[Endorsed]: Filed Sept. 27, 1943. Paul P O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

APPELLANTS' CONCISE STATEMENT OF
POINTS ON WHICH THEY INTEND TO
RELY ON APPEAL AND DESIGNATION
OF PARTS OF RECORD APPELLANTS
THINK NECESSARY FOR THE CONSID-
ERATION OF SUCH POINTS

Pursuant to the provisions of Paragraph 6 of Rule 19 of this Court, appellants above named file as a concise statement of the points on which they intend to rely on this appeal, and designate the hereinafter mentioned parts of the record which appellants think are necessary for the consideration of such points:

1. The District Court erred in holding that plaintiff recover damages for an alleged breach of a written contract when plaintiff was aware that the breach occurred when more than 50 per cent of the work to be done under the contract had not been performed, and plaintiff failed to give notice of rescission and failed to rescind the contract.

2. The District Court erred in giving judgment to plaintiff when plaintiff admitted it was notified in October of 1940, when less than 50 per cent of the contract was completed, that plaintiff was to pay the cost of constructing the falsework or interior framework supporting the steel placed by plaintiff, and then continued with the contract, accepting all benefits thereunder, and made no attempt to rescind the contract. Defendants claim to have given this notice in July and September of 1940, when only about 17 and 37 per cent, respectively, of the work was done, but about these earlier dates there is a conflict; about the October date there is no conflict.

3. The District Court erred in giving judgment for plaintiff when the evidence disclosed plaintiff accepted payments from defendants in accordance with the contract after plaintiff was aware defendants expected plaintiff to pay for the cost of the falsework, when about 50 per cent of the job remained to be done and payments normally due plaintiff were withheld by defendants until the cost of the construction of the falsework had been offset.

4. The District Court erred in granting judgment to plaintiff when the contract between plaintiff and defendants called for the construction and placing of reinforcement bars, the material consisting of steel bars was furnished by the United States, about which were to be built piers, and which placing and construction of bars were to be done in accordance with the specifications of the contract

between defendants and the Bureau of Reclamation, United States Department of Interior, and allowed plaintiff to recover the cost of falsework or interior framework that was essential for the uses of plaintiff in placing the reinforcement steel bars and where plaintiff undertook and actually did the construction of the falsework during one day of the contract.

5. The following errors were committed by the District Court in admitting oral evidence tending to vary the terms of the written contract dated January 6, 1940, between plaintiff and defendants.

(a) Testimony by Witness Ross L. Mahon, (T. 108 to T. 112), in which he stated conversations held during October 1939 between J. A. Dowling, the then manager of Union Paving Co., and Edward L. Soule, president of plaintiff company, one conversation being in Dowling's room at the Senator Hotel at Sacramento while Dowling was in bed, the substance of the latter conversation being, Soule quoted a price of \$33.80 a ton for the reinforcement steel to be installed, which included the cost of supporting structure for the steel. Objection to this testimony was made by Mr. Wrigley, then counsel for defendants, as follows:

Mr. Wrigley: I want to object to this as irrelevant, incompetent and immaterial. The parties in this case entered into a formal written contract as of January 6, 1940 that superseded all prior negotiations, discussions, offers and everything else, and anything they may have agreed prior to that date was carried into that contract and cannot be admis-

sible under the California Civil Code, Section 1625. (T. 108-9).

The Court: I will allow it subject to a motion to strike. (T. 109). * * *

Mr. Wrigley: May it please the Court, to save time, may it be understood that my objection goes to the entire line of examination without repeating it continuously?

Mr. Moore: It is so stipulated. (T. 109). * * *

Mr. Wrigley: At this time I want to move to strike out the entire testimony of this witness on the ground that it is an attempt to vary the terms of a written contract which the parties formally entered into at a later date. Section 1625 of our Civil Code of California provides that the execution of a contract in writing, whether the law requires it to be written or not, supersedes all the negotiations or stipulations concerning matters which preceded or accompanied the execution of the instrument.

The Court: I will allow it to go in so we can have a record on the ground of the witness not being available, and it is all going in subject to your motion to strike and your objection, and I will give both sides an opportunity to examine into the matter fully. (T. 112).

(b) During the cross-examination of J. A. Dowling he was asked by counsel for plaintiff as to a conversation held on December 29, 1939, in plaintiff's office as to how framework or falsework should be built and who should pay for it. (T. 167). The following occurred:

Mr. Wrigley: I object to that as incompetent, irrelevant, and immaterial, and an attempt to go back over a written contract, which is prevented by Section 1625 of our Code. The parties agreed to a writing, in which the obligations of each party were stated. An attempt to reopen that in order to vary the contract I say is objectionable. * * * (T. 168).

The Court: Pardon me. What was the date of the meeting?

Mr. Moore: December 9, 1939. (Meeting December 29, 1939.) * * *. (T. 170).

The Court: The objection may be overruled. You may answer. (T. 180).

After the overruling of the objection, testimony was received as to details of drawings, one of which, the witness testified was not the drawing submitted in Court which was supposed to show the false-work and which plaintiff claimed defendants agreed to pay for and erect, various bids made by plaintiff, letters concerning the basis of bid, all antedating January 6, 1940, the date of the contract, and the following occurred:

Mr. Wrigley: Just a second, Mr. Dowling. So the record will be clear, will it be stipulated, in the interest of time, that I object to this entire line of examination, that it all goes in subject to my objection and my motion to strike?

Mr. Moore: It will be stipulated. * * * (T. 182).

A letter dated December 11, 1939, plaintiff's Exhibit 21, that purported to contain the terms of the contract, was offered in evidence.

Mr. Moore: I will introduce this in evidence, your Honor.

Mr. Wrigley: Same objection.

The Court: Let it be admitted and marked. (T. 183).

(c) Through Witness Edward L. Soule (T. 211 to 224) testimony was elicited, over defendants' objection, as to conferences showing estimates and bids made by plaintiff prior to the execution of the contract, drawings made by plaintiff's representative, details as to the type of supporting devices, or falsework to be constructed, how the estimate was scaled down from \$30.00 a ton for the placing of the reinforcement bars to \$28.60, then further reduced by \$3.77 a ton (T. 216) representing the cost of the supporting devices, and a sum arrived at \$24.80 as plaintiff's bid. Discussions as to type of falsework, (T. 219) welding of the bars, and statements alleged to have been made by a representative of defendant company that (T. 220) defendants would assume the cost of the falsework.

All the foregoing testimony was admitted over defendants' objection, and how finally the bid price was lowered to \$22.75 and ultimately to \$22.50 a ton. (T. 222).

Mr. Moore: We also offer a copy of letter of December 11th produced by Mr. Soule and identified by him.

Mr. Wrigley: The same objection.

The Court: Same ruling.

(The document was received in evidence and marked "Plaintiff's Exhibit 23.") (T. 224).

(d) During testimony of Lester Earl Stevens (T. 279) plaintiff sought, and the witness testified as to estimate made, prior to the execution of the contract, for placing the reinforcement steel bars and the cost of the falsework to support them, and during which testimony the witness stated his estimates were first with the cost of the falsework and revised thereafter to exclude this cost.

This testimony was objected to, as follows:

Mr. Wrigley: I want to object to this as incompetent, irrelevant, and immaterial, attempting to vary the terms of a written contract.

The Court: The objection is overruled. * * * (T. 280).

Mr. Wrigley: Same objection to this entire line of examination.

The Court: Read the question, Mr. Reporter.
(Question and answer read.)

The Court: The objection is overruled.

Mr. Wrigley: Will you stipulate, Counsel——

Mr. Moore: I will stipulate.

Mr. Wrigley (continuing): ——that my objection runs to this entire line of examination, and I will in due course make a motion to strike out?

Mr. Moore: So stipulated. (T. 280-281).

(e) Testimony was offered by plaintiff through Alexander Cochrane (T. 291) as to conversations had in December 1939 regarding the preparation of a draft of a plan showing the falsework and reinforcement bars, the various sums suggested as the bid price of the work to be undertaken by plaintiff and that defendants agreed to pay for and con-

struct the falsework. This line of testimony was objected to by counsel for defendants.

Mr. Wrigley: I object to this as incompetent, irrelevant, and immaterial, and an attempt to vary the terms of a written contract in violation of Section 1625 of the Civil Code. (T. 291).

The Court: The objection is overruled. (T. 291).

Mr. Wrigley: Can we stipulate, Counsel, that my objection goes to this entire line of examination?

Mr. Moore: It will be so stipulated. (T. 292).

Thereafter counsel for defendants argued the motion to strike all testimony seeking to vary the terms of the written contract, and the Court, after hearing argument, denied the motion to strike.

6. The Court erred in accepting any testimony to vary the written contract of January 6, 1940, or the terms of the contract between United States Department of the Interior with defendant Union Paving Co. (Defendants' Exhibit T), as the contract of January 6 reduced all prior negotiations to a written form, from which the intent of the parties is to be ascertained. The contract of January 6, 1940 was unambiguous and certain, as were the terms of the contract between Union Paving Co. and the United States Department of the Interior, the terms and conditions of which plaintiff was bound by specific reference in the contract of January 6, 1940 and required plaintiff to place the reinforcement bars at a unit bid price, which price "shall include the cost of furnishing and attaching wire ties and metal supports if used, of unloading, hauling, sorting, storing, cutting, bending, clean-

ing, placing and securing and maintaining in position all reinforcement bars.''' (Sec. 66 Contract between United States and Union Paving Co., Ex. T.)

7. The evidence does not support the Findings of the District Court in the following respects:

(a) That the contract was uncertain, ambiguous and indefinite as to who should pay for the cost of the falsework, scaffolding and interior framework. (Par. VIII Findings, p. 5).

(b) That during preliminary negotiations prior to entering into the contract, defendants agreed to pay the cost of the falsework, scaffolding and interior framework and that defendants eliminated such cost from their bid. (Par. VIII Findings, p. 5).

(c) The Conclusions of Law are contrary to the laws of the State of California and the decisions of this Court applicable to the evidence submitted.

8. There is no evidence or finding to support the conclusion that there was any attempt on the part of defendants to falsify any declaration, act or omission made or performed by defendants. No question of fraud or falsification entered into the case, nor is any alleged or charged. (Conclusions p. 13, par. II)

Appellants hereby designate as the parts of the record which they think are necessary for the consideration of such points the following:

1. All of the evidence and proceedings which the parties have stipulated and agreed, in a stipulation dated August 31, 1943, and filed with the above entitled court, shall be printed or reproduced in the printed record.

2. All the exhibits which the parties hereto have, in said stipulation, stipulated and agreed need not be included in the printed record, because of their nature or character it is impossible or impracticable to include the same therein, but which have been sent to the above entitled court by the District Court for its inspection and use on the appeal, and which the parties have stipulated and agreed in said stipulation may be so used.

Dated: September 27, 1943.

HENRY F. WRIGLEY

DION R. HOLM

Attorneys for Appellants

206 City Hall

San Francisco

Receipt of a copy of the foregoing Appellants' Concise Statement of Points on which they intend to rely on Appeal and Designation of Parts of Record Appellants think Necessary for the Consideration of such Points, is hereby acknowledged this 27th day of September, 1943.

THELEN & MARRIN

COURTNEY L. MOORE

Attorneys for Appellee

[Endorsed]: Filed Sept. 27, 1943. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

APPELLEE'S DESIGNATION OF ADDITIONAL PARTS OF THE RECORD WHICH APPELLEE BELIEVES ARE MATERIAL

Pursuant to the provisions of Paragraph VI of Rule 19 of this Court, appellee above named hereby designates additional parts of the record which it believes are material to the consideration of the points urged by appellants.

By points 1 to 4, appellants urge that assuming that appellant breached the contract, that the sole remedy of appellee was to rescind the contract and cease performance, and that it failed to rescind, but on the contrary performed the contract in its entirety, and that because it failed to rescind the contract and performed it in its entirety, that appellee cannot recover; and under point 5, appellants urge that error was committed by the District Court in permitting oral evidence tending to vary the terms of the written contract dated January 6, 1940, between appellant, Union Paving Co., and Appellee, and has designated certain portions of the record and the ruling of the District Court in admitting said evidence as error.

In reply thereto, appellee states that all of the evidence and exhibits have probative value bearing upon the foregoing issues and therefore in compliance with the provisions of Paragraph VI, Rule 19, of this Court hereby designates the entire tran-

script on appeal together with all exhibits introduced in evidence as material to these issues.

Dated: October 1, 1943.

THELEN & MARRIN

COURTNEY L. MOORE

Attorneys for Appellee

[Endorsed]: Filed Oct. 4, 1943. Paul P.
O'Brien, Clerk.

